



U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 013 55177 Office: CALIFORNIA SERVICE CENTER Date: **APR 28 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is engaged in the import and wholesale of toys manufactured by the foreign parent company. The petitioner currently employs the beneficiary as its president, and seeks to extend the employment of the beneficiary in the United States for an additional three years. The petitioner filed a petition requesting that the beneficiary be classified as a nonimmigrant intracompany transferee. The director denied the petition stating that the beneficiary was not employed in the United States in a primarily 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 for review. On appeal, counsel for the petitioner asserts that "as the number-one executive of the [U.S.] company, the beneficiary is performing primarily the duties that are characteristics [sic] of duties performed by a manager and executive." Counsel submits a brief in support of the assertions on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) further 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii), 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 (I)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 a letter appended to the petition, the petitioner explained that as president of the U.S. entity, the beneficiary's job duties included: establishing company policies and operational guidelines; exercising personnel management authority; hiring and firing the subordinate manager; directing through subordinate management staff marketing plans and financial policies; and, coordinating the business plan with the foreign parent company. The petitioner also submitted an employment certificate from the beneficiary's foreign employer in which the president of the foreign company stated that the beneficiary's responsibilities in the United States would include formulating policy and regulations, reporting to the board of directors, coordinating with the company's accountant, and designating projects to the corporate staff. An accompanying organizational chart of the U.S. company identified the beneficiary's subordinates as a manager, an accountant, a salesman, and a warehouse worker.

The director issued a request for evidence in which he asked that the petitioner submit: (1) an organizational chart describing the managerial hierarchy and staffing levels of the U.S. company, including a description of their job duties, educational levels, salaries, and immigration status; and (2) a more detailed description of the beneficiary's job duties in the United States. The director requested that the petitioner be specific in its explanation of the beneficiary's education and employment qualifications, and that the petitioner assigns a percentage of time the beneficiary would spend on each job duty.

In response, the petitioner provided the following outline of the beneficiary's job responsibilities:

- 20% Plan, develop, and establish policies and long term goal[s] of business organization in accordance with [the] board, and chairman directives, and corporation charter;
- 5% Hire/fire and evaluate performance of manager;
- 20% Direct and coordinate activities of the whole company and administer organizational objectives through subordinate manager;
- 30% Confer with administrative personnel, [and] manager to review achievements and discuss required changes of company operation and policies, goal[s], and objectives;
- 20% Establish short-term goals, and objectives;
- 5% Coordinate with parent company in capital expense, remit and report quarterly to Chairman in China.

The petitioner also provided an outline of the job duties performed by the beneficiary's subordinates. As the job descriptions are part of the record, they will not be repeated herein. Additionally, the petitioner explained that with regard to the position as company president, the beneficiary must be familiar with the operations of the foreign company and its managers, must have at least one year of experience as a general manager in the foreign company, and must have five years of financial or accounting experience. The petitioner explained

that the beneficiary is not required to speak fluent English, as the manager can communicate proficiently in English to company contacts and subordinate employees.

In his decision, the director outlined the requirements for establishing “executive capacity,” and explained that the petitioner failed to establish that the beneficiary, as president of the U.S. entity, would be employed in a primarily executive capacity. The director stated that the petitioner “had close to a year to establish the organization and build it to where it will support an executive position,” yet the organizational hierarchy of the U.S. organization does not support employment of the beneficiary as an executive. The director concluded that “with such a configuration” the beneficiary would be performing day-to-day operations of the company. The director consequently denied the petition.

On appeal, counsel states that the issue in the present matter is “whether the beneficiary is a manager or executive when he manages a small number of employees but is responsible for overall management of the company.” Counsel, referring to the petitioner’s outline of the beneficiary job responsibilities, asserts that the beneficiary is performing job duties characteristic of those performed by a manager or executive. Counsel also refers to two unpublished AAO decisions pertaining to functional managers and “one-person offices,” and claims that the beneficiary, like those in the AAO decisions, is operating at a senior level within the organization, and exercises discretion over the day-to-day operations of the organization. Counsel contends that the beneficiary is therefore employed in a primarily managerial or executive capacity.

Counsel’s assertions on appeal are not persuasive. 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). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. Rather, a petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* If the petitioner is representing the beneficiary is both an executive and a manager, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In the present matter, the petitioner has not distinguished the beneficiary’s position as that of either a manager or an executive. Instead, both the petitioner and counsel rely on partial sections of the regulations defining managerial capacity and executive capacity. For instance, in both the petitioner’s original letter and response to the director’s request for evidence the petitioner stated that the beneficiary would establish the short and long-term goals of the organization, direct and coordinate company activities, formulate the company’s policy and regulations, and report to the board of directors. These statements paraphrase elements of the definition of “executive capacity” without conveying an understanding of the beneficiary’s actual daily duties. *See* §§ 101(a)(44)(B)(i), (ii), and (iv) of the Act. The petitioner also provides the following managerial job responsibilities of the beneficiary: hiring, firing and evaluating her subordinate manager, designating projects to subordinate personnel, and conferring with personnel on corporate operations, policy and objectives. *See* §§ 101(a)(44)(A)(ii) and (iii) of the Act.

Additionally, on appeal, counsel asserts that as “the number-one executive” of the petitioning organization, the beneficiary is performing duties of “a manager or executive,” yet fails to specifically identify how the beneficiary’s job duties meet each of the four requirements of both managerial capacity and executive capacity. As noted above, the petitioner cannot claim to employ the beneficiary as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. The petitioner must

establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In addition, counsel claims that the present issue is whether the beneficiary is considered to be a manager or executive "when he manages a small number of employees but is responsible for overall management of the company." Counsel asserts that the beneficiary is the "number-one executive" over the company's four employees, and therefore is primarily performing duties characteristic of a manager or executive. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The reasonable needs of the petitioner, however, serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. Although the director based his decision partially on the size of the staff, and did not take into consideration the reasonable needs of the enterprise, the petitioner has not established the essential element of managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, counsel's reliance on two unpublished AAO decisions is misplaced. Counsel claims that with regard to functional managers or "one-person offices," the AAO previously approved L-1A petitions, determining that "the beneficiary operates at a senior level within the organization[al] hierarchy and that the beneficiary exercises discretion over the day-to-day operations of these functions." Counsel's claim is not supported by the present record as the petitioner did not contend that the beneficiary is employed as a functional manager; nor is the beneficiary employed in a "one-person" office. Additionally, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial. As already determined above, the petitioner has not met its burden of establishing that the beneficiary's duties are primarily managerial or executive. Furthermore, counsel has not provided a copy of the unpublished decisions for the record. Pursuant to the regulation at § 103.3(c), a designated CIS decision must be published and made available to the public in order for a decision to serve as precedent. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

For the foregoing reasons, the petitioner has failed to demonstrate that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Beyond the decision of the director, it remains to be determined whether the beneficiary was employed abroad in a primarily managerial or executive capacity prior to her transfer to the U.S. entity. The petitioner stated in a letter submitted with the petition that the beneficiary functioned as the parent company's general manager. The petitioner also provided a description of the beneficiary's job responsibilities in the foreign entity. However, in the organizational chart for the foreign company, the petitioner failed to identify the beneficiary's previous position as general manager; nor did the organizational chart reflect an individual who assumed the position of general manager following the beneficiary's transfer to the United States. Absent additional evidence, it is unclear whether the position of general manager existed in the foreign company, and if so, which employees were managed by the beneficiary. Doubt cast on any aspect of the petitioner's proof

may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.