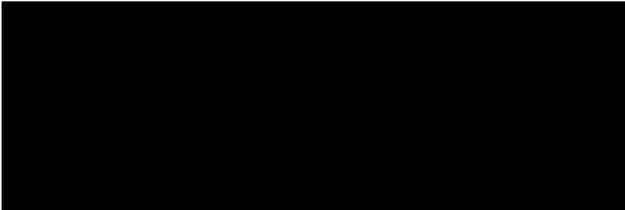


U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: LIN 02 214 55350 Office: NEBRASKA 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)

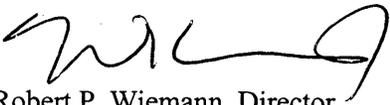
ON BEHALF OF PETITIONER:
[Redacted]

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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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 sale of machines for processing and packaging bakery products. The petitioner seeks to extend the beneficiary's temporary employment as a sales manager, and filed a petition requesting that the beneficiary be classified as a nonimmigrant manager or executive, rather than the beneficiary's present classification as an intracompany transferee with specialized knowledge. The director denied the petition concluding that the beneficiary would not be employed in the U.S. entity 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, the petitioner submits "a further elaboration of [the beneficiary's] job duties," and requests that the beneficiary be considered an intracompany transferee with specialized knowledge rather than a manager or executive.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

- (b) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 in the present matter is whether the beneficiary will be employed in the United States entity 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 submitted with the petition, the petitioner stated that the beneficiary is the sole representative of one line of the company's products. The petitioner noted that as sales manager, the beneficiary "is required to function in a diverse range of roles," including providing direct sales management, conducting presentations and meetings with customers, and generating proposals. The petitioner explained that the beneficiary is specifically responsible for: (1) meeting with clients to endorse the company's services and equipment, and to ascertain the clients' needs; (2) visiting existing clients to offer technical services on equipment; (3) preparing contracts, proposals, and layout designs for factory production lines; (4) conduct investment justification and plant service calculations; and, (5) organize trade shows.

In a request for evidence, the director outlined the above-noted job duties and asked that the petitioner assign a percentage of time that the beneficiary spends on each. The director also requested that the petitioner explain the beneficiary's role as sales manager in comparison to the company's director of sales position, held by another employee.

In response, the petitioner explained that as sales manager, the beneficiary is responsible for the sales of one line of the company's products, while the director of sales is a representative of the second product line. The petitioner also stated that the beneficiary's time on each of the sales duties is allocated as follows:

- ?? Providing Direct Sales management (15% or 6 hours per week)
- ?? Conducting technical presentations and discussions with customers (15% or 6 hours per week)
- ?? Generating systems proposals (5% or 2 hours per week)
- ?? Contacting and visiting clients on a daily basis (10% or 4 hours per week)
- ?? Visiting clients to discuss new projects and offer service on existing equipment (10% or 4 hours per week)
- ?? Preparing proposal and contract documents (10% or 4 hours per week)
- ?? Preparing layout drawings (5% or 2 hours per week)
- ?? Working with clients to identify production requirements (10% or 4 hours per week)
- ?? Being [sic] client contact for technical and process-related issues (10% or 4 hours per week)
- ?? Conducting investment justification calculations and plant service calculations (8% or 3.2 hours per week)
- ?? Organizing trade shows (2% or 0.8 hours per week)

The petitioner further stated that the beneficiary functions as the only representative in the United States for his particular product line, and is responsible for evaluating potential corporate customers, conducting sales and follow-up visits, and providing technical assistance. The petitioner also claimed that "[b]ecause [the beneficiary] is ultimately responsible for managing an essential function and component of the U.S. business," and exercises discretionary authority over the day-to-day sales, the beneficiary qualifies as a manager in the U.S. entity.

In her decision, the director concluded that the beneficiary was not employed in the United States in a primarily managerial capacity. The director stated that the beneficiary, who has no subordinate personnel, is performing the non-qualifying duties of a sales person. The director also noted that the petitioner did not establish that the beneficiary was managing or directing an essential function, or that the beneficiary is in a high-level position within the organizational hierarchy, or with respect to the function. The director, therefore, denied the petition.

On appeal, the petitioner states that the beneficiary's "general responsibilities" are to represent the parent companies and their products in the United States, to provide direct sales management, to conduct technical presentations with customers, and to generate system proposals. The petitioner further provides that the beneficiary's "specific responsibilities" are:

- (1) Visit customers on regular sales tours to endorse [the petitioning organization's] equipment and services, to discuss new projects and to offer service and enhancements on existing equipment;
- (2) oversee customer and product development in the United States;
- (3) prepare full bakery systems proposals;
- (4) prepare layout drawings showing production lines to be installed in customer factory space;
- (5) work with customers to identify production requirements;
- (6) act as customer contact for technical and process-related issues with [the petitioning organization's] equipment;
- (7) conduct investment justification calculations and plant service calculations, including electrical and gas consumption and water and air provision;
- (8) organize trade shows when required;
- (9) assist with the negotiation of sales contracts;
- (10) manage sales budgets, order intake, profit margins, commissions, and sales expenditures;
- (11) as the company's U.S. presence grows, manage company agents and local sales offices;
- (12) conduct training sessions for sales personnel from sister companies and worldwide sales agents; and,
- (13) report directly to [the petitioning organization's] Director of Sales, who is responsible overall for U.S. sales, including overseeing sales costs, establishing a complete customer database for the U.S. market, and setting and maintaining advertising and marketing budgets.

The petitioner also requests on appeal "to withdraw the L-1A request and recharacterize the L-1 extension we filed on [the beneficiary's] behalf as a request to extend his L-1B status." The petitioner submitted additional evidence in support of its claim that the beneficiary possesses specialized knowledge.

The analysis of this issue will be based solely on the job description submitted with the initial petition, rather than considering the petitioner's request on appeal that the beneficiary's classification be changed to that of a specialized knowledge capacity. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). In the present matter, the petitioner requested on the initial petition that the beneficiary be classified as a nonimmigrant intracompany transferee employed in a managerial or executive capacity. Therefore, the AAO will consider the evidence available to the director at the time of his review. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

On review, the record does not demonstrate that the beneficiary is employed in the U.S. organization in a primarily managerial or executive capacity.

Although the petitioner asserted that, as a sales manager, the beneficiary is “responsible for managing an essential function and component of the U.S. business,” the petitioner failed to establish that the beneficiary is a functional 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary’s daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

In this matter, the petitioner specifically identified the beneficiary’s job responsibilities, and assigned a percentage of time to be spent on each job duty. The majority of the beneficiary’s job duties, however, do not fall directly under traditional managerial duties as defined in the statute. Specifically, the beneficiary spends approximately 55% of his time directly acquiring and selling to new customers, and personally meeting with existing customers to identify needs, discuss new projects, conduct technical presentations, and service equipment. In contrast, the beneficiary spends only 15% of his time “providing direct sales management.”¹ The record, therefore, is devoid of evidence sufficient to substantiate the petitioner’s claim that the beneficiary will manage the sales function, rather than merely perform it. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Consequently, the petitioner has failed to establish that the beneficiary is employed in the U.S. entity as a functional manager.

It is noted that there is no indication in the record that the beneficiary possesses knowledge of the company’s products, service, research, equipment, techniques, or management that is “special” or “more advanced” than that of an average sales employee. While the petitioner asserts that the beneficiary attended “classroom and practical process training sessions,” the evidence does not establish that this training is additional, or superior to, the training received by other employees responsible for selling the petitioner’s products. While the beneficiary may be important to the petitioner’s business, the record does not demonstrate that he is “key personnel.” See *1756, Inc. v. Attorney General*, 745 F. Supp. 9 (D.D.C. 1990) (Congress’ intent was that specialized knowledge capacity should not extend to all employees with specialized knowledge, but rather those referred to as “key personnel” and executives). If the petitioner wishes to seek classification of the beneficiary as an intracompany transferee with specialized knowledge, it must file a new petition with the director.

¹ It should be noted that the petitioner defines “providing direct sales management” as creating a database of potential customers, and “regularly call[ing] or visit[ing] the contact until a project solidifies and more assistance is required.” While the petitioner claims this is a “management” function, it appears the beneficiary is essentially performing as a salesperson for the company.

LIN 02 214 55350

Page 7

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.