



U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 048 50404 Office: CALIFORNIA SERVICE CENTER Date: 4/11/07

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Offi

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 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 petitioner is a corporation organized in the State of California that is operating as a distributor, wholesaler, and developer of digital electronic devices. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Seoul, Korea. The petitioner now seeks to employ the beneficiary as its vice-president/chief financial officer.

The director denied the petition concluding that the beneficiary would not be employed by the U.S. entity in a primarily managerial or executive position.

Counsel subsequently filed a motion to reopen and reconsider. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel contends that the beneficiary would be employed in a primarily executive capacity as he would be directing the management of the sales and marketing department and managing a subordinate staff of professional and managerial personnel. Counsel submits a brief in support of the 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(i)(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 (I)(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 issue in this proceeding is whether the beneficiary would be employed by the petitioning organization 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

On the nonimmigrant petition filed on November 27, 2002, the petitioner indicated that the beneficiary would be employed as the company's vice-president/chief financial officer, and would be responsible for directing all of the company's financial matters. In an attached letter dated November 1, 2002, the petitioner provided the following job description for the beneficiary:

First, [the beneficiary] will establish the overall financial goals and policies in order to maximize the company's resources and increase profitability. [The beneficiary's] educational background in business administration will be important to his overall ability to accomplish his task.

Second, with his marketing experience with our foreign parent company, [the beneficiary] will oversee and manage our domestic, international, and on-line marketing divisions to boost sales of our company's products. To fulfill his job duties and responsibilities, [the beneficiary] will take an active role in overseeing the daily operation of the marketing and sales team. [The beneficiary] will manage over [sic] professional employees including [a] market researcher, budget analyst, graphic designer, advertisement consultant, and other business administrators. [The beneficiary] will provide proposed plans and updated analysis of marketing strategies to the President and Board of Directors. [The beneficiary] will review and assess work-products of all professional employees under his direct supervision and exercise authority to hire and fire all personnel under his supervision. [The beneficiary] will also exercise [a] wide range of discretion in making decisions such as entering into contracts on behalf of the company.

The petitioner also submitted an organizational chart for the U.S. company, which identified the beneficiary as the vice-president overseeing the national sales division, the international sales division, the on-line sales division, and customer service. The petitioner also submitted Forms 941, Employer's Quarterly Federal Tax Return, however, none were signed or dated, and the Form 941 covering the quarter immediately before the petitioner filed the nonimmigrant petition was omitted.

On December 5, 2002, the director issued a request for evidence and asked that the petitioner submit a list of all U.S. employees identifying each employee's name, job title and job description. The director also requested a U.S. organizational chart identifying the company's managerial hierarchy, staffing levels, and the beneficiary's position within the company.

In a response dated December 9, 2002, the petitioner provided a list of the petitioning organization's four current employees, and identified three of the employees – sales manager, market researcher, budget analyst – as subordinates of the beneficiary. The petitioner indicated on the organizational chart that the beneficiary would be subordinate to the president-chief executive officer, and would establish the petitioner's financial goals and oversee the company's marketing and sales function. The petitioner also included job descriptions for the employees supervised by the beneficiary, and noted that each held a bachelor's degree.

In a decision dated December 27, 2002, the director noted that other than the market researcher, budget analyst, and sales manager, there are no other employees, particularly sales personnel, functioning in the other departments. The director stated that "it is clearly evident that each of these employees must be carrying out all the day-to-day operations of the entire business," and concluded that "it is not feasible that the beneficiary will be functioning in a position wherein substantially all his duties would be at the managerial or executive level." The director further stated that the beneficiary would be performing both managerial and day-to-day operations of the business as a result of the insufficient staff. Consequently, the director denied the petition.

In an appeal filed January 24, 2003, counsel outlines the regulatory requirements for "executive capacity," and states that the record "clearly demonstrate[s] that the [b]eneficiary will be primarily directing the management of a major component or function of the company." Counsel also states that the beneficiary's position in the U.S. company is a senior-level position, in which the beneficiary would oversee professional employees and would receive only general supervision, rather than a first-line supervisory position. In addition, counsel notes that in the past, the petitioner has employed as many as nine employees, and is presently hiring additional employees who would be supervised by the beneficiary. Counsel contends that based on the aforementioned, the beneficiary would be employed in an executive position. As additional evidence, counsel submits a letter from the

petitioning organization in which the petitioner provides a description of the beneficiary's job duties similar to the job duties outlined in the petitioner's November 2002 letter.

On review, the record does not demonstrate that the beneficiary would be employed in a primarily 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the instant matter, the petitioner cited criteria from both the statutory definition of "managerial capacity" and the statutory definition of "executive capacity," yet failed to establish the beneficiary's employment in either capacity. Specifically, the petitioner stated in its November 1, 2002 letter that the beneficiary would establish the company's financial goals and policies and exercise a wide range of discretion in making decisions pertaining to corporate contracts. These duties are outlined in the regulations as typical "executive" duties. *See* 8 C.F.R. § 214.2(l)(1)(ii)(C). Yet, the petitioner also stated in the same letter that the beneficiary would perform the following job duties characteristic of a manager: manage the domestic, international, and on-line marketing divisions, manage and review the work of "professional employees," and exercise authority to hire and fire all subordinate personnel. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B). Counsel's assertion on appeal that the beneficiary is employed "in an executive capacity in that he is not a first-line supervisor but will be managing over a subordinate staff of professional and other managerial personnel" also indicates that counsel is using the terms managerial and executive capacity interchangeably. *Id.* A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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 if it is representing the beneficiary is both an executive and a manager.

Furthermore, although counsel asserts that the beneficiary would be supervising professional employees, the record does not contain evidence establishing this claim. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, it appears that an advanced degree may be useful in performing as a sales

manager, market researcher or budget analyst. However, because the petitioner provided only brief descriptions of the job responsibilities related to these positions, the record is not conclusive in establishing that bachelor's degrees, although useful, are necessary. Moreover, although the petitioner states that each subordinate employee possesses a bachelor's degree, no evidence, such as diplomas or transcripts, demonstrating the completion of this level of education was provided. 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).

Furthermore, although at least one of the beneficiary's subordinates is identified as a sales manager, the absence of other employees in the sales department indicates that this employee is not actually a manager. Therefore, the beneficiary cannot be considered to be supervising managerial employees. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

The record also demonstrates that the beneficiary may be performing some non-qualifying duties of the U.S. organization. The petitioner stated in its response to the director's request for evidence that the beneficiary would be responsible for establishing the company's financial goals and policies. However, the petitioner has not identified any employees who would be responsible for carrying out the company's financial policies. The petitioner only states that additional employees will be hired upon the approval of the beneficiary's nonimmigrant petition. Therefore, it is reasonable to assume that the beneficiary will not only establish the financial goals of the U.S. company, but also perform the related functions. 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). Also, 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. 1978). Therefore, counsel's explanation on appeal that the petitioner will hire additional employees who will be supervised by the beneficiary is not relevant to the present matter.

The AAO acknowledges counsel's claim on appeal that the regulations "do not prescribe any number of employees that the Beneficiary must supervise to qualify for the L-1A position." In fact, section 101(a)(44)(C) of the Act states that staffing levels alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Regardless of the number, however, the petitioner is required to demonstrate that the beneficiary's responsibilities will meet the requirements of either managerial capacity or executive capacity. The petitioner has not met this essential burden.

Based on the foregoing reasons, the AAO cannot conclude that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

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.