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U.S. Citizenship
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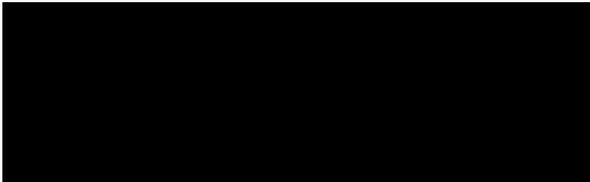
FILE: WAC 02 204 53172 Office: CALIFORNIA SERVICE CENTER Date:

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:

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 claims to be engaged in the planning and production of commercial films. The petitioner claims that it is the parent company of Twin Planet Communications, a branch office located in Tokyo, Japan. The petitioner seeks to employ the beneficiary in the United States as multinational manager of its post-production division.

On July 3, 2002, the director denied the petition. The director determined that the petitioner had not established: (1) that the beneficiary will be employed in a primarily executive or managerial capacity; and, (2) that the petitioner has a qualifying relationship with the foreign entity.

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's counsel asserts that it submitted sufficient to establish the qualifying relationship between the U.S. company and its Tokyo branch office. Counsel further asserts that the beneficiary would continue his current managerial duties in the United States. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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 first issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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.

On June 10, 2002, the petitioner described the beneficiary’s U.S. duties in an attachment to Form I-129 as:

- Plan, coordinate, and supervise various aspects of post production such as audio work, music, scenes, timing, camera work, and script writing to ensure that the project is completed within time-frame and budget.

- Review filmed scenes and approve final editing of filmed productions.
- Oversee production to ensure that the project is completed within time-frame and budget.
- Confer with director to discuss production progress and results.
- Finalize projects independently and present them for client's approval.

On June 12, 2002, the director requested additional evidence. In particular, the director requested:

- The U.S. entity's organizational chart showing the beneficiary's position in the chart.
- The beneficiary's job duties in detail, including the percentage of time to be spent on each duty.
- Indicate whether the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees and provide the name, job title and job duties of those employees.
- Clarify why the petitioner's Form 1120, U.S. Corporation Income Tax Return shows no salaries/wages paid for the five claimed employees and submit DE-6 or payroll records.

In response to the request for additional evidence, on June 25, 2002, the petitioner submitted a copy of the petitioner's ten-year business standing and projections, a copy of the petitioner's organizational chart, and a description of the beneficiary's duties:

The beneficiary will be responsible for hiring additional employees for [the petitioner] to form the team that our post production unit will require.

* * *

While in the process of helping us grow, [the beneficiary's] main supervision will be of other entities and affiliates that a production company such as [the petitioner] must hire in order to complete their projectsIn bringing [the beneficiary] to the U.S., [the petitioner] aims to obtain its own post production studio, staff it, and use it to complete the necessities of each project.

As such, [the beneficiary] would not only be supervising the staff [the petitioner] already has, but he will supervise "independent contractors" hired to assist us in each project, and eventually supervise the additional staff he will be in charge of hiring as we grow.

The petitioner also provided the following anticipated breakdown of the beneficiary's job duties for the period 2002 to 2003:

2002	3 rd Qtr	75% Systems Setup
		20% Training
		5% Production

2002	4 th Qtr	45% Systems Setup 30% Training 25% Production
2003	1 st Half	15% Systems Setup 10% Training 75% Production
2004	2 nd Half	5% Systems Setup 10% Training 85% Production

On July 3, 2002, the director denied the petition. The director stated that the beneficiary would not be employed in a primarily managerial or executive capacity. The director noted that although the U.S. organization claimed to have five employees, the tax records did not indicate that salaries or wages were paid to the claimed employees. The director found no evidence that the U.S. entity had employees.

On appeal, the petitioner's counsel asserts that the beneficiary would continue his current managerial duties in the United States. Counsel states "[t]he beneficiary has been "coordinating and supervising entire post production facilities and its [sic] employees. He has reviewed filmed scenes and approved them for editing and finalized productions himself."

In addition, counsel interprets the regulations and states the following:

Based on the definition, the beneficiary is not required to actually supervise any employees of the company. Rather, the focus is on the beneficiary's role within the company. Therefore, if [the beneficiary] is primarily responsible for overseeing and developing a specific department or subdivision of the company, which inevitably requires supervision of employees and the hiring of new employees, such a responsibility would satisfy the requirements of 8 C.F.R. 214.2(l)(ii)(B). Additionally, if the beneficiary manages an essential function within the company, such as post production in a production company such as [the petitioner], he is considered to hold a managerial position, as defined by the regulation.

Counsel further states that the 1990 Act specifically barred the number of persons supervised as the sole basis for denying managerial status to an employee. Counsel also states that "if the company hires independent contractors, as has clearly been documented and explained by [the petitioner] here, doing so is sufficient to satisfy this element of the requirements for an L-1 Visa." Counsel claims that the U.S. organization's business plan includes details of "independent contractors employed by the company to assist in performing the operational activities of the business." Counsel claims that:

[The petitioner] has clearly established, through tax returns, the statement of its owner, Mr. Bassin, and other documentation, that it is capable of paying for the services of independent contractors, as well as its own employees. In the movie/production industry, most "employees" are more appropriately classified as independent contractors. [The petitioner]

does employ a certain number of employees, including [the beneficiary], who primarily work between Japan and the U.S. and who are paid by the Japanese office.

Counsel also describes the beneficiary as further developing the post-production division of the U.S. organization. Counsel claims that the post-production conducted currently in the U.S. is being done through the hiring of independent contractors and renting of production studios and that the beneficiary's role will be to change this trend so that it is managed, directed and staffed by direct employees of the petitioner. The petitioner describes the beneficiary's duties as:

- Ensuring that [the petitioner] puts together a core team of post production employees.
- Ensuring that the work is being done to the standards and quality expected of [the petitioner's] customers in Japan.
- Have [the beneficiary] hire the necessary individuals for the post production division.

In a July 31, 2002 letter, the petitioner notes that the U.S. company has no "official employees" but uses payroll companies to pay the staff it uses on a temporary basis. The petitioner asserts that the beneficiary is needed to start and maintain a new division within the company.

In 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). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[p]lan[ing], coordinat[ing], and supervis[ing] various aspects of post production," "overseeing production" and "finaliz[ing] projects independently" The petitioner did not, however, explain how the beneficiary plans, coordinates, or oversees production, or what specific tasks he performs to "finalize projects." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without additional explanation, the AAO cannot determine whether these responsibilities would involve primarily managerial duties.

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner merely stated that he would divide his time between "systems set up," "training," and "production." The petitioner again failed to identify any specific duties to be performed by the beneficiary. The AAO cannot determine whether the beneficiary will directly perform systems set up and technical production tasks, or whether he would direct others to do so. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, the petitioner describes the beneficiary as being involved in "review[ing] filmed scenes" and "finaliz[ing] productions himself." Since the beneficiary actually reviews filmed scenes and finalizes

productions himself, he is performing tasks necessary to provide a service or product and these duties cannot be considered managerial or executive in nature. 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).

The petitioner clearly indicates on appeal that the U.S. company currently has no employees, but that the beneficiary "will hire additional employees to form the team that our post production unit will require." However, 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).

Moreover, the petitioner claims that the beneficiary will "supervise independent contractors," and notes that the company's business plan includes the names of three companies who regularly provide services for the petitioner. These companies include a San Francisco-based graphic design company, a Vancouver-based "web engineering center," and a New York-based feature film development company. However, the petitioner has neither presented evidence to document the existence of its claimed contract employees, nor identified the specific services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees would obviate the need for the beneficiary to primarily perform non-qualifying operational duties associated with the post-production process. 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.

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's 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. Since the petitioner has not described the duties to be performed by the independent contractors, or described the duties or educational requirements for the proposed positions to be filled by the beneficiary, the petitioner has not established that the beneficiary will supervise a staff of managerial, supervisory or professional employees.

Moreover, counsel states, "The beneficiary is not required to actually supervise any employees of the company. Rather, the focus is on the beneficiary's role within the company. Therefore, if [the beneficiary] is primarily responsible for overseeing and developing a specific department or subdivision of the company, which inevitably requires supervision of employees and the hiring of new employees, such a responsibility would satisfy the requirements of 8 C.F.R. 214.2(l)(ii)(B)." 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 furnish a detailed job description which identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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 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. 1988)).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner claims that the beneficiary oversees the post-production department of the company. However, since there is no evidence insufficient evidence of any employees or independent contractors who will work for the company, this raises the question of who will actually perform the post-production work undertaken by the petitioner. The petitioner's description of the beneficiary's proposed duties indicates that the beneficiary will be providing the services of the business by directly performing the post-production tasks of the company rather than overseeing production.

Based on the above, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has established a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i).

The regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms, in relevant part, as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation division or office of the same organization housed in a different location.

In a June 6, 2002 letter submitted with the initial petition, counsel for the petitioner indicated that the beneficiary's foreign employer is a branch office of the U.S. company. The petitioner submitted a current lease for the Tokyo-Japan office which identifies the petitioner as the tenant, with a monthly rent of 215,000 yen; a business plan for the U.S. entity identifying the Tokyo location as one of its main offices, and pay stubs for the beneficiary which identify the source of the funds as "Twin Planet Communications, Inc."

On June 10, 2002, the director requested, in part, additional evidence of the ownership and control of the foreign entity, including the articles of incorporation, minutes of the organizational meeting, stock ledger showing all stock certificates issued to the present date and total number of shares sold, names of shareholders, purchase price, or a copy of the foreign entity's partnership agreement.

The petitioner responded by submitting a letter from its owner explaining that the foreign office is a branch of the U.S. company, copies of bank wire transfers from the U.S. company to the foreign office, copies of the petitioner's bank statements confirming the wire transfers, and copies of lease agreements for the Tokyo office dating back to 1997. In its June 25, 2002 letter, the petitioner explained the relationship between the two entities as follows:

All business matters that take place in Tokyo, including banking, are controlled by the entity in Los Angeles. The funds are wired between Tokyo and the U.S. as required for each project. . . . As the Tokyo office is simply a branch office, there are no ownership issues, and therefore no stock certificates, articles of incorporation, or the like is required The Tokyo bank account is linked directly to the corporate account in Los Angeles.

On July 3, 2002, the director denied the petition. The director stated that the evidence was insufficient to establish a qualifying relationship between the U.S. and foreign entities. The director noted that there was nothing in the initial record to show ownership and control of the foreign organization, and no documentary evidence to support the petitioner's claim that the beneficiary's foreign employer is a branch sales office of the U.S. organization.

On appeal, counsel asserts that the petitioner submitted sufficient evidence to establish that a qualifying relationship exists between the petitioner and the foreign branch office. The petitioner submits additional copies of wire transfers, lease agreements for the foreign office, and evidence of rent payments for the foreign office, made by the petitioner.

On review, the AAO finds sufficient evidence to establish a qualifying relationship between the petitioner and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). When a U.S. company establishes a branch in the foreign country, the branch is bound to the parent company through common ownership and management.

In the instant matter, the AAO finds sufficient evidence to establish that the beneficiary's current employer in Japan is a branch office managed and controlled by the petitioner, and thus qualifies as an office of the same organization housed in a different location. Accordingly, the director's decision with respect to this issue will be withdrawn.

Beyond the decision of the director, the AAO is not persuaded that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated to establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act

(the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *See id.* The petitioner has provided a broad description of the beneficiary's foreign duties. For example, on Form I-129, the petitioner described the beneficiary's foreign duties as "plan, coordinate and supervise various aspects of post production; review filmed scenes and approve final editing of filmed productions." The petitioner did not, however, describe what specific tasks the beneficiary performs to plan, coordinate, or supervise post-production activities, or explain how reviewing film meets the definition of managerial or executive capacity. As previously stated, 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.

The AAO notes a discrepancy in the record concerning the beneficiary's job duties abroad. Although the petitioner indicated on Form I-129 that the beneficiary has "supervised various aspects of post production," the beneficiary's resume indicated that the beneficiary was "designing the post-production wing of the business in Tokyo and Los Angeles." The resume also indicates that the beneficiary was "designing a high end composting system in conjunction with a major electronics' firm." This description of the beneficiary's role with the foreign entity suggests that his duties are primarily technical, rather than supervisory or managerial in nature. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on the above, the petitioner has not established that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign company as required by 8 C.F.R. § 214.2(l)(3)(iv). For this additional reason, the petitioner may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 appeal will be dismissed.

ORDER: The appeal is dismissed.