

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: EAC 01 105 53792 Office: VERMONT SERVICE CENTER

Date: OCT 20 2004

IN RE: Petitioner:
Beneficiary:



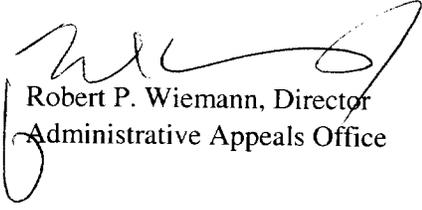
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

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

The petitioner claims to be in the business of importing and exporting power tools. It claims to be a branch office of Shanghai Xing Te Hao Industrial Co., located in Shanghai, China. The petitioner claims six employees, seven independent contractors, and \$414,345.00 in gross annual income. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and executive officer for two years, at an annual salary of \$38,000.00.

The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary has been or will continue to be employed primarily in an executive or managerial capacity.

On appeal, the petitioner disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties have been and will continue to be primarily executive or managerial in nature.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, or a subsidiary, or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 issue to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed primarily in an executive or managerial 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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a letter of support dated January 30, 2001, the petitioner described the beneficiary's duties as:

Sets the company's policy and also develops strategies for the marketing and sales of the products that the parent company manufactured; expands the company's business to meet Board of Director's target; consults with parent company's Board of Directors and advise them of appropriate changes and development in products manufactured in parent company's factory; oversees the management personnel, currently including vice president, corporate controller, operating manager, and sales manager; develops new business relationship with big potential customers such as K-Mart, Wal-Mart, Home-Depot, Sears, and TruServe; establishes excellent image of the company in the hardware industry; searches for appropriate middle size manufactures in USA and bring them to China for parent company's acquisition purposes; [sic] communicates and negotiates with overseas agencies and corporation; and conducts final negotiation/executes purchases/sales contracts.

The petitioner also stated that the U.S. entity employed six full-time employees including: four in operation/management, one in customer service, and one in the warehouse. The petitioner stated that the company also employed seven commission based sales representatives who work in their separate territories. As evidence, the petitioner submitted copies of IRS Form 1120, Form 1099, and Form 941 for the year 2000.

In response to the director's request for additional evidence, the petitioner described the beneficiary's duties and provided a breakdown of the time spent performing those duties to include:

- Set company policies and develop strategies for marketing of products – 10 hours
- Telephone meeting with parent company's executives to execute the directives of the Board of Directors at parent company – 5 hours
- Oversee the management personnel, weekly and daily meeting with vice president, corporate controller, operating manager, and sales manager – 6 hours
- Communicate and negotiate with overseas agencies and corporations, and conduct final negotiations/executes sales/purchase contracts – 5 hours
- Review periodical management reports, identify the problem and make decision for necessary improvements – 5 hours
- Consult with parent company's Board of Directors and advise them of appropriate changes and development in products manufactured in parent company's factory – 5 hours
- Visit/host key customers principles – 5 hours

- Attend important national hardware shows – 2 hours
- Attend public affairs – 2 hours

The petitioner also provided position descriptions and a breakdown in the number of hours spent performing each task by the controller/vice president, operating manager, sales/marketing manager, customer service representative, administrative assistant, and warehouse staff. The petitioner stated that a bachelor's degree in finance and two years of work experience was required for the corporate controller position. The petitioner listed the duties of the seven sales representatives to include: "responsible for sales and marketing our line of products nationally; product positioning, product exposure, selling methodology, and sales manual development; develop and maintain account trade show supervision and participation."

The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporation Income Tax Return for 2000; Form I-9, Employee Information Forms for seven employees; Form 941, Employer's Quarterly Federal Tax Return for 2000 and 2001; Form W-2, Wage and Tax Statement for 2000 and 2001; and Form 1099, Misc. Income for 2000 and 2001.

The director denied the petition after determining that the evidence was insufficient to establish that the beneficiary had been or would be employed primarily in a managerial or executive capacity. The director noted that the petitioner's Form 941 did not list the purported sales representatives; that other staff "nebulously" included four persons in operations/management; and that the description of the staff's job duties was in abstract form. The director concluded that there had been insufficient evidence submitted to show that the beneficiary would be managing or supervising the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the corporation. The director also concluded that based on the evidence of record it appeared that the beneficiary has been and would be performing the day-to-day duties of the organization.

On appeal, the petitioner disagrees with the director's decision and asserts that the evidence submitted with the petition as well as in response to the director's request for additional evidence on the subject is sufficient to establish that the beneficiary has been and will continue to be employed by the U.S. entity primarily in a managerial or executive capacity. The petitioner contends that the director failed to take all evidence into consideration before rendering his decision. The petitioner further asserts that the beneficiary's job duties were not described in the abstract but were extremely detailed, providing a breakdown in the number of hours spent performing each duty. The petitioner contends that the evidence of record shows that seven independent contractors are employed by the U.S. entity as sales representatives, and are supervised by the sales/marketing manager. The petitioner also contends that the director seemed to ignore the evidence demonstrating that professional supervisory personnel such as the controller, operating manager, and sales/marketing manager had been hired to relieve the beneficiary from performing the day-to-day non-qualifying services of the organization. The petitioner submits no additional evidence on appeal.

While the petitioner has presented additional clarifications and explanations, the record does not support a finding that the beneficiary has been and will be employed in a 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(1)(3)(ii). The petitioner's description of the job duties 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial in nature. A beneficiary

may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include setting company policies and developing marketing strategies; overseeing the management personnel; communicating and negotiating with overseas businesses and agents; and attending trade shows and public affairs. The petitioner did not, however, define the policies or strategies that the beneficiary devises, or adequately detail how the beneficiary oversees management personnel. 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). 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).

In addition, the petitioner describes the beneficiary as being responsible for communicating and negotiating with overseas agencies and corporations, and for executing purchase and sales contracts. Since the beneficiary actually negotiates and executes the company's purchase and sales contracts overseas, he is performing a task necessary to provide a service or product and this duty will not 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).

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, the petitioner described the duties and educational requirements of the controller/vice president to be a bachelor's degree in finance and two years work experience. Although the petitioner described the company's educational requirements, there has been no evidence submitted to

demonstrate the beneficiary supervises the controller's activities or that the controller has actually received a degree to qualify him for the position. Furthermore, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the duties of the operation manager, sales/marketing manager, or customer service representative, who are among the beneficiary's subordinates.

Although the petitioner asserts on appeal that the company employs seven independent contractors as sales representatives, the evidence is insufficient to show that the sales/marketing manager supervises them. The petitioner did submit copies of seven IRS Forms 1099, which demonstrate that four companies and three individuals employed by three companies other than the petitioner, received non-employee compensation from the petitioner for a period during 2000 and 2001. However, this evidence is insufficient to show that the independent contractors were employed on a full-time basis by the U.S. entity or that they received any form of managerial or supervisory instruction from the U.S. entity. There is also a lack of evidence to establish to what extent the independent contractors' time was spent relieving the beneficiary from performing non-qualifying duties of the organization. The evidence shows that the independent contractors were contracted to perform sales and marketing tasks; however, there is no indication from the record that the duties qualify as performing a major function of the U.S. entity or providing a major service that allowed the entity to achieve its goals. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

In review, the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity. In this matter, the beneficiary is described as president of an import and export company consisting of a controller, operating manager, sales/marketing manager, customer service representatives, and warehouse staff. The petitioner has not demonstrated that the beneficiary, as a president and chief executive, has been or will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. There has been insufficient evidence submitted to establish that the beneficiary manages the organization; supervises and controls the work of other supervisory, professional, or managerial employees; has the authority to recommend personnel actions; functions at a senior level within the organizational hierarchy; and exercises discretion over the day-to-day operations of the business. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he has been or would be responsible for the management of the organization or a major component or function of the organization; establishing goals and policies, exercising a wide latitude in discretionary decision-making, and would receive only general supervision or direction from higher level individuals. The beneficiary's title alone is not sufficient in demonstrating that the beneficiary will function at a senior level within an organizational hierarchy. Accordingly, 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.