



U.S. Citizenship
and Immigration
Services



File: WAC 03 092 50136 Office: CALIFORNIA SERVICE CENTER

Date: **OCT 25 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)

IN 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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prevent unwarranted
invasion of personal privacy

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

The petitioner is a corporation organized in the State of California in November 2001. It exports recycled papers and U.S. made binoculars and imports Chinese video compact discs. It seeks to extend the temporary employment of the beneficiary as its vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a wholly owned subsidiary of Asian Lake Ltd., located in Hong Kong, China.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director's decision is incorrect.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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, that 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 position held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 January 16, 2003 letter appended to the petition, the petitioner stated that:

Because the President [REDACTED] who resides in Shanghai, China, only gives general supervision to the operations of the U.S. subsidiary, [the beneficiary], the sole Vice[-]President, actually has been and will be in charge of the overall management of the US subsidiary. [The beneficiary] designs and develops business plans and policies, and exercises decision-making power over the operation and management of the company. He supervises, directs, and evaluates the managerial group in implementing various plans, rules and regulations of the company, and gives instructions. He reviews the company’s financial statements and marketing proposals for further business development. He determines the structure of administrative facilities, and personnel appointments, hires and discharges managers and employees. Furthermore, he reports to the President, the Board of Directors of the parent company, and receives general supervision from the President and the Board.

The petitioner also provided its organizational chart showing the beneficiary in the position of vice-president overseeing the office secretary, the import/export department, and the sales/marketing department.

On March 27, 2003, the director requested: (1) a copy of the petitioner’s organizational chart listing all employees under the beneficiary’s supervision by name, job title, and a brief description of their job duties, educational levels, and annual salaries; (2) the petitioner’s California Forms DE-6, Employer’s Quarterly Wage Report, for the last three quarters; and, (3) copies of the petitioner’s payroll summaries.

In response, the petitioner provided the same organizational chart but also submitted a separate list of the employees under the beneficiary’s supervision. The petitioner indicated that the office secretary provided “high-level administrative support, prepare[d] correspondence, receive[d] visitors, and schedule[d] meetings.” The petitioner stated that the individual employed in the import/export department was “[i]n charge of import/export operations of the U.S. company.” The petitioner noted that the sales and marketing individual

was in charge of the sales and marketing operation in the U.S. office. The petitioner provided its California Forms DE-6, for the second, third, and fourth quarters of 2002.¹ The second quarter 2002 Form DE-6 showed that the petitioner employed four individuals in April, four individuals in May, and five individuals in June. The third quarter 2002 Form DE-6 showed that the petitioner employed four individuals in July, three individuals in August, and two individuals in September. The fourth quarter 2002 Form DE-6 showed that the petitioner employed no individuals in October, one individual in November, and three individuals in December.

The director determined that the petitioner's organizational chart did not substantiate the petitioner's claim that the beneficiary would supervise, direct, and evaluate a managerial group. The director further determined that the record did not demonstrate that the beneficiary would exercise significant authority over generalized policy. The director concluded that the petitioner had not established that the beneficiary's duties would be in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director's decision is incorrect. The petitioner notes that the beneficiary's position is "in full charge of the overall management." The beneficiary states: "I am functioning in full executive capacity. I have successfully developed three major import/export businesses between China and U.S. in the past year: export recycled papers for paper cart boards [sic] and pulps production in China, export U.S. made binoculars to China, and import China made Video CD to U.S." The petitioner asserts that the beneficiary's subordinates are working in a managerial or administrative capacity to conduct the specialized import/export operations, which requires professional knowledge and expertise.

The petitioner's assertions 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(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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. The petitioner's description of the beneficiary's actual duties does not establish that the beneficiary meets each of the criteria in one or the other of the statutory definitions.

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 "design[ing] and develop[ing] business plans and policies, and exercise[ing] decision-making power over the operation and management of the company," and "supervise[ing], direct[ing], and evaluat[ing] the managerial group in implementing various plans, rules and regulations of the company, and gives instructions." The petitioner did not, however, define the petitioner's business plans and

¹ The petitioner's response to the director's request for evidence is dated April 5, 2003 so that the first quarter 2003 Form DE-6 may not have been available when the response was filed. The petition was filed in January 2003, so the most pertinent Form DE-6 would be the Form DE-6 for the first quarter 2003.

policies and did not adequately describe the claimed managerial employees' tasks. 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).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "in charge of the overall management of the US subsidiary." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, the petitioner's organizational structure and the petitioner's statement that the beneficiary "determines the structure of administrative facilities, and personnel appointments, hires and discharges managers and employees" are indicative of an individual performing a supervisory role within the firm. 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. See section 101(a)(44)(A)(iv) of the Act. The record does not support the petitioner's claim on appeal that the beneficiary's subordinates require professional knowledge and expertise.

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). In this matter, the petitioner did not provide descriptions of the beneficiary's subordinates' duties that would establish that the positions required knowledge or learning of an advanced type gained by a prolonged course of specialized instruction and study.

Finally, a portion of the description of the beneficiary's duties indicates that the beneficiary will review the company's financial statements and marketing proposals for further business development. However, the petitioner has not provided evidence of who other than the beneficiary will actually perform the tasks associated with the petitioner's accounting, bookkeeping, and marketing tasks. 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).

In sum, the petitioner has not provided sufficient evidence that the beneficiary will perform primarily managerial or executive duties or that it has sufficient staff to relieve the beneficiary from performing primarily non-qualifying duties. The petitioner has not presented evidence on appeal to overcome the director's decision in this matter.

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.

ORDER: The appeal is dismissed.