



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

File: WAC 03 031 50912 Office: CALIFORNIA SERVICE CENTER

Date: **OCT 28 2004**

IN RE: Petitioner:

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)

IN BEHALF OF PETITIONER:

[REDACTED]

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 disclosure of unarranted  
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 January 1990. It imports, exports, and distributes machinery. 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 China National Machinery Import and Export Corp., located in Beijing, 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, counsel for the petitioner asserts that the petition was erroneously denied because the beneficiary's job duties and other evidence submitted were not considered in their entirety before the director rendered his decision.

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 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 an October 29, 2002 letter appended to the petition, the petitioner listed the beneficiary's duties:

As Vice President, [the beneficiary], will exercise overall responsibility for managing and directing the day-to-day operations of the company, and its general corporate affairs. She will oversee market research operations and customer relations with our important customers such as Alstom Pressure System, Hewlett-Packard Company, Tektronix Inc., Fluke Corp., LeCroy Corp., and other U.S. companies. [The beneficiary] will serve in a senior advisory role to the company's Board of Directors in connection with its domestic and international business operations. She will be responsible for managing and directing strategy and direction for contract negotiation, purchasing, import and export, personnel administration and general corporate affairs. She will be responsible for setting corporate policies for corporate capital investment, evaluation import and export operations. [The beneficiary] also will be responsible for coordinating business activities between the U.S. and our parent company. Further, [the beneficiary] will direct and supervise the implementation of the company's policies and objectives through subordinate management, professional and support staff, and report to the company's President and its Board of Directors on a regular basis concerning general and specific business operations of the company. Finally, she will handle personnel administration matters, including hiring, firing, promotions, leaves and other important employee matters, and exercise authority over the activities of managerial professional support staff.

The petitioner also noted that the beneficiary was well qualified for this "executive" position. The petitioner included its organizational chart showing the beneficiary as vice-president reporting directly to the petitioner's president. The chart identified the beneficiary's direct subordinates as an import manager and an export manager. The chart also listed two sales representatives and a marketing analyst reporting to both the import manager and export manager. A secretary was also listed as subordinate to the import manager and the export manager as well as a financial manager. The petitioner provided brief job descriptions for each of the employees subject to the beneficiary's supervision. The descriptions essentially restated each individual's title. For example, the import manager's duties were described as "in charge of import department dealing in import business," and the marketing analyst's duties were described as "analyzing and reporting marketing situation."

The petitioner's 2002 third quarter California Form DE-6, Employer's Quarterly Wage Statement, listed the beneficiary as receiving a \$7,500 wage for the third quarter, while the import manager, export manager, secretary, and marketing analyst all received wages of \$462 for the quarter.

On February 4, 2003, the director requested the petitioner's organizational chart including a brief description of job duties, educational levels, annual salaries/wages and immigration status for all employees under the beneficiary's supervision. The director also requested a more detailed description of the beneficiary's duties including the percentage of time she spent in each of the listed duties.

In a February 27, 2003 response, the petitioner restated the beneficiary's duties and included the percentage of time she spent on her duties as follows:

The beneficiary has been and will continue to be the Vice President of our company. In this capacity, [the beneficiary] will assist the president to exercise overall responsibility for managing and directing the day-to-day operations of the company and its general corporate affairs, report to the company's President and its Board of Directors on a regular basis concerning general and specific business operations of the company (she will spend approximately forty percent of her time on these duties).

She will oversee market research operations and customer relations with our important customers such as Alstom Pressure System, Hewlett-Packard Company, Tektronix Inc., Fluke Corp., LeCroy Corp., and other U.S. companies (she will spend about fifteen percent of her time on these duties).

[The beneficiary] will serve in a senior advisory role to the company's Board of Directors in connection with its domestic and international business operations, and will coordinate business activities between the U.S. and our parent company (she will spend approximately ten percent of her time on these duties).

She will be responsible for managing and directing strategy and direction for contract negotiation, purchasing, import and export, personnel administration and general corporate affairs (she will spend about fifteen percent of her time on these duties).

Finally, she will handle personnel administration matters, including hiring, firing, promotions, leaves and other important employee matters, and exercise authority over the activities of managerial professional support staff (she will spend about twenty percent of her time on these duties).

The petitioner added that the import manager, export manager, secretary, and marketing analyst were paid \$7.77 per hour for working in the office, plus commission. The petitioner indicated that the two sales representatives were paid on a commission basis once a year. The petitioner also included two independent contracts between the petitioner and the two identified sales representatives.

The director observed that the petitioner's description of the beneficiary's duties was broad and general. The director determined that the beneficiary would be providing the petitioner's services and would not be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary's position involves significant authority over general policy and that the majority of the beneficiary's duties include directing management. Counsel contends that the beneficiary's duties have been demonstrated. Counsel claims that the petitioner's organizational chart substantiates that the beneficiary receives only general supervision from the petitioner's president, thus substantiating that the beneficiary meets one of the criteria for "executive capacity." Counsel claims that, in addition, the organizational chart shows that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. Counsel argues that the beneficiary is not a

first-line supervisor and does not primarily produce a product or provide the petitioner's services. Finally, counsel contends that the beneficiary's subordinates are professional employees whose positions are also professional positions. Counsel includes copies of advertisements for the positions of import manager and for export manager and excerpts of the Occupational Outlook Handbook that defines the duties of a sales representative.

Counsel'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(l)(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 the statutory definitions. Further, counsel seems to acknowledge that the beneficiary meets only one of the criteria for "executive capacity."

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 spends 40 percent of her time "assist[ing] the president to exercise overall responsibility for managing and directing the day-to-day operations of the company and its general corporate affairs," and "report[ing] to the company's President and its Board of Directors on a regular basis concerning general and specific business operations of the company." The petitioner adds that the beneficiary spends 10 percent of her time "serve[ing] in a senior advisory role to the company's Board of Directors in connection with its domestic and international business operations, and [coordinating] business activities between the U.S. and our parent company." The petitioner does not however, detail the actual duties the beneficiary performs in carrying out these imprecise and broadly stated 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).

Although the petitioner claims that the beneficiary oversees market research operations and customer relations, it does not have individuals employed full-time to carry out the market research and customer relations. Likewise, the petitioner has not submitted documentary evidence that it has employees who negotiate contracts, provide the routine purchasing, and handle the import and export daily duties full-time. Based on the beneficiary's subordinates' hourly wage and the petitioner's California Form DE-6, the market analyst, import manager, and export manager are employed a limited amount of time. The record contains no evidence that these individuals have been compensated for other than working a limited number of hours. Thus, based on the record, the beneficiary as the employee responsible for market research, customer relations, purchasing, and import and export functions must be providing these services to the petitioner. If

the beneficiary is performing these functions, the AAO notes that 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).

Finally, although the organizational chart is a helpful tool in deciphering a petitioner's corporate structure, a petitioner must support its claims regarding its corporate structure with other evidence. In this matter, the petitioner has not provided sufficient evidence to substantiate that the beneficiary's time is spent primarily supervising subordinates or managing the tasks carried out by subordinates. As stated above, the record does not demonstrate that the petitioner has sufficient staff to relieve the beneficiary from performing the routine tasks associated with importing, exporting, selling, and distributing the petitioner's product. 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. at 190.

Of note, counsel's contention that the beneficiary's subordinates are professional employees whose positions are also professional positions is unpersuasive. The petitioner did not provide sufficient information regarding the part-time import manager and export manager's duties to conclude that either of these positions comprise professional, supervisory, or managerial positions. Similarly, the record contains insufficient evidence to conclude that the petitioner's part-time market analyst's position required knowledge or learning, not merely skill, of an advanced type in the field of marketing. Further, the petitioner submitted no evidence that its sales representatives had ever been compensated; thus making it impossible to conclude that these individuals actually provided the petitioner's sales services.

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's assignment for the petitioner is primarily managerial or executive. The record does not contain sufficient evidence to overcome the director's decision on this issue.

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.