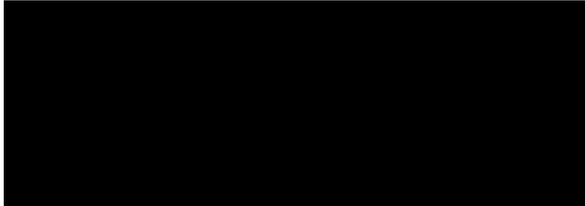


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FILE: WAC 01 298 51555 Office: CALIFORNIA SERVICE CENTER Date: **APR 01 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

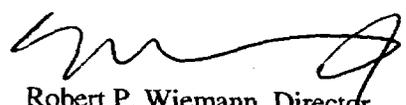
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

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

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, General Staff USA, Inc., endeavors to classify the beneficiary as a nonimmigrant manager or executive 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 wholly owned subsidiary of [REDACTED], located in Japan. The petitioner is engaged in the dental services business. The initial petition was approved to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's general manager. The petitioner was incorporated in the State of California in June 2000 and claims to have six employees.

On May 9, 2002, the director denied the petition because the petitioner had not established that the beneficiary will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel states that the beneficiary "undertakes numerous managerial and executive functions."¹

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(I)(3) state 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.

¹ The AAO notes that the petitioner's counsel, [REDACTED] failed to submit a properly filed G-28. The AAO contacted counsel on several occasions. On October 26, 2004 at 4:44 p.m., a representative from the AAO informed counsel that he needed to submit a properly filed G-28. The representative contacted counsel again on November 2, 2004 and left a voice message. On November 10, 2004, the AAO spoke with counsel who stated that he was waiting for the petitioner to sign the Form G-28 and then he would fax a copy to the AAO. On November 18, 2004, the representative spoke again with counsel who stated that he would fax a copy of the Form G-28 that day. The AAO never received the copy. Finally, on November 24, 2004 at 11:21 a.m., the representative left a message on counsel's voice mail to call the AAO concerning his Form G-28.

- (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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act which 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 positions 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 will employ the beneficiary 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. 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 September 28, 2001, the petitioner filed Form I-129. The petitioner described the beneficiary's U.S. duties in an August 29, 2001 supporting letter as:

- Function[s] at a senior executive level and direct [sic] an essential function within [the U.S. Company]. Exercises policy making authority for direction and coordination of strategic product planning, procurement, and sales activities. Monitor[s] progress of operational and administrative programs to achieve smooth flow of operation. Has the authority to hire and fire personnel. Evaluates performance of management for compliance with corporate policies and standards;
- Has authority of decision making in budgeting and settlement affairs, cost calculation, coordination and supervision of stocktaking/inventory control, fixed asset management, and review of financial statements;
- Directs research of market condition for introduction of [the U.S. company's] services. Conducts long-range and short-term strategic planning and development of marketing plans;
- Directs activities of workers in the General Staff USA dental laboratory to ensure the quality of General Staff's products;
- Directs protective and constructive audits to ensure compliance with established policies and procedures. Directs record management procedures for systematic retention, protection, retrieval, transfer and disposal of records. Reviews social management studies to improve

workflow, simplify reports procedures and implement cost reduction programs. Reviews staff recommendations and approves changes in management procedures, information network systems, budgetary limitations and organizational procedures; and

- Plans and develops public relations policies designed to improve our U.S. corporation's public image and relations with customers, employees, and the public. Establishes policies that provide government, industry and community groups with economic, Marketing and technical information. Promotes efforts to increase economic growth and employment stability in local communities.

In addition, the petitioner submitted a U.S. organizational chart and stated that the beneficiary will continue to "exercise wide latitude and discretionary decision making in, establishing the most advantageous courses of action for the successful management and direction of our national and international activities."

On December 12, 2001, the director requested additional evidence. In particular, the director requested a more detailed description of the beneficiary's U.S. duties, the percentage of time the beneficiary spends on each of the duties, a description of the U.S. entity's staffing, and a description of the employees' duties. The director also requested Form DE-6 Quarterly Wage Report and copies of the U.S. entity's payroll summary.

In response, the petitioner, through counsel, submitted a second revised U.S. organizational chart and a description of the U.S. employees' duties. The petitioner, through counsel, claimed that the business is in the "start-up phase and is still in the process of establishing its business in the United States; therefore, more local hiring is expected as business grows." In addition, the petitioner, through counsel, claimed that the beneficiary:

- Spends the majority of her time planning and developing policies and objectives for the U.S. entity.
- Devotes time necessary to direct the legal affairs.
- 30 percent of her time is spent planning and supervising marketing where a sales and marketing account manager assists the beneficiary in promoting and marketing the products and services and the beneficiary works with various advertisement agencies to create ads, brochures, and websites. The beneficiary makes the final decision and authorizes all marketing plans and promotions.
- 20 percent of her time supervising financial matters.

The petitioner also submitted a copy of Form DE-6 Quarterly Wage Report and copies of the U.S. entity's payroll summary including copies of the Wage and Tax Statement Forms.

On May 9, 2002, the director denied the petition because the petitioner had not established that the beneficiary will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel states that the beneficiary "undertakes numerous managerial and executive functions." Counsel reiterates the beneficiary's duties. Counsel also claims that the beneficiary "functions at a senior executive level and direct an essential function within [the U.S. company], she exercises policy making authority for direction and coordination of strategic product planning, procurement, and sales activities." In addition, counsel submits a third revised U.S. organizational chart.

In examining the executive or managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(1)(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 spending the majority of her time "planning and developing policies and objectives" for the U.S. entity and "exercis[ing] policy making authority for direction and coordination of strategic product planning, procurement, and sales activities." However, these duties are generalities that fail to explain how the beneficiary will plan and develop policies and objectives and what authority the beneficiary will exercise. 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).

In addition, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act. For instance, the beneficiary's position is depicted as exercising "wide latitude and discretionary decision making" for the successful management and direction of activities. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, counsel claims that the beneficiary's U.S. duties include spending "30 percent of her time . . . planning and supervising marketing where a sales and marketing account manager assists the beneficiary in promoting and marketing the products and services." The beneficiary also is described as "work[ing] with various advertisement agencies to create ads, brochure[s], and websites." Even though counsel claims that the beneficiary "authorizes all marketing plans and promotions," it appears that the beneficiary authorizes her own plans for marketing. The U.S. entity's organizational charts and the employees' job descriptions are unclear as to who actually performs these marketing related tasks. Thus, either the beneficiary herself is performing the marketing function or she does not actually supervise the marketing function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Since the beneficiary works with agencies to create the ads, brochures, and websites, and assists in

promoting and marketing products then the beneficiary is performing the operational marketing tasks of the business. If the beneficiary is performing these tasks, 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).

Counsel also claims that the beneficiary “[f]unctions at a senior executive level and [d]irects an essential function.” However, the AAO is not persuaded that the beneficiary’s duties establish the beneficiary has control and authority over a function of the company. If a petitioner claims that the beneficiary is directing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties attributed to directing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary’s daily duties demonstrating that the beneficiary directs the function rather than performs the duties relating to the function. In the instant matter, it is unclear what function the beneficiary directs. To allow the broad application of the term “essential function” to include such broad claims, without identifying specifics, would render the term meaningless.

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. The petitioner claims that the beneficiary supervises employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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. However, it is unclear whom the beneficiary actually supervises. The petitioner submitted three distinct U.S. organizational charts. The initial chart depicts the beneficiary as having two subordinates including an administrator, and a technical department manager who manages a dental technician. The second revised U.S. organizational chart, submitted in the response to the request for additional evidence, shows that the beneficiary’s subordinates include an administrator and a sales and marketing employee. The third revised chart, submitted on appeal, indicates that the beneficiary’s subordinates are a secretary and account executive, a laboratory manager, and although unclear, six dental technicians. It is also noted that the first two charts indicate that one of the beneficiary’s subordinates, Naomi Murphy, is the administrator. However, in the third revised chart, Naomi Murphy is the secretary and account executive. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, on appeal, a petitioner cannot materially change a position’s level of authority within the organizational hierarchy or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, the petitioner claimed that it is in the “start-up phase and is still in the process of establishing its business in the United States; therefore, more local hiring is expected as business

grows.” 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). In addition, the regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad as defined in section 101(a)(44) of the Act. As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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 submitted a broad description of the beneficiary’s duties. For example, the petitioner described the beneficiary as the manager of the sales department who “establish[ed] our parent company’s business territories and expand[ed] and develop[ed] the sales of our parent company’s services.” For this additional reason, the petition 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.