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U.S. Citizenship
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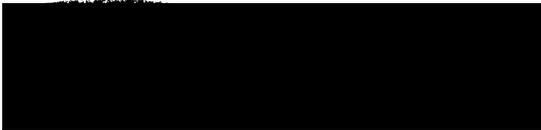
File: WAC-04-043-53490 Office: CALIFORNIA SERVICE CENTER Date:

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)

IN 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Vice President/General Manager 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 operates as an international freight forwarder. The petitioner claims that it is the subsidiary of Shanghai Pudong International Transportation Co. Ltd., located in Shanghai, China. The beneficiary was initially approved for L-1 status in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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, counsel for the petitioner asserts that the petitioner has shown that the beneficiary will be employed in a primarily managerial or executive capacity, and that the director disregarded evidence submitted in response to a request for evidence. Counsel further suggests that the director erroneously based his decision on the small staff size of the petitioner. In support of these assertions, counsel submits a brief and previously provided evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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 the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 letter submitted with the initial petition on December 3, 2003, the petitioner described the beneficiary's job duties as follows:

In executive capacity Beneficiary primarily directs the management of the organization; establish the goals and policies of the organization; exercise wide latitude in discretionary decision-making and receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. Beneficiary's duties include conducting general administration affairs of the company, acting as liaison and representative for the petitioner's foreign parent in the U.S. marketing the services of the parent company, engaging in long-range planning and identifying business opportunities in the U.S. and international markets, directing the business activities, and supervising other managers and professionals.

For the managerial capacity, beneficiary primarily manage [sic] the organization. Supervise and control the work of other supervisory, professional, or managerial employees, has the authority to hire and fire or recommend those as well as other personnel actions such as promotion and leave authorization, exercise direction over the day-to-day operations of the activity or function for which the employee has authority.

On December 13, 2003, the director requested additional evidence. In part, the director requested: (1) a more detailed description of the beneficiary's duties in the United States, including an indication of the percentage of time she devotes to each duty; and (2) the titles and duties of the beneficiary's subordinates.

In a response dated January 5, 2004, the petitioner submitted a statement that indicates that the beneficiary invests 65 percent of her time acting as the petitioner's general manager/vice president, and 35 percent of her time acting as the petitioner's sales department manager. The petitioner further described the beneficiary's duties as follows:

Vice President/General Manager . . .

Percentage of Time Spent on the following duties: **5%**

- Set up the organization and establishes the goals and policies of the organization;

Percentage of Time Spent on the following duties: **40%**

- Conducts general administration affairs of the company;
- Exercises direction over day-to-day operations of the activity or function for which the employee has authority;
- Exercises wide latitude in discretionary decision-making and receives only general supervision or direction from higher level executives, the board of directors, or shareholders of the organization;

- Manages the organization, arranges assignments and supervises and controls the work of other supervisory, professional, or managerial employees;
- Has the authority to hire and fire or recommends those as well as other personnel actions such as promotion and leave authorization;

Percentage of Time Spent on the following duties: **20%**

- Acts as liaison and representative for the petitioner's foreign parent company, and provides the latest market trend of North America to the parent company to help them adjust business strategy of Sino-America Route timely;
- Engages in long-term planning and identifies business opportunities in the U.S. and international markets;
- Directs the business activities, and supervises other managers and professionals with their business activities;

Percentage of Time Spent on the following duties: **20%**

- Visits customers and maintains good relationship with them as well as the main steamship lines used . . .

Percentage of Time Spent on the following duties: **15%**

- Keeps an [sic] keen eye on the new policies and regulations coming out constantly from the U.S. government related to this industry, makes sure that both the U.S. office and the foreign parent company understand and fully comply; attends workshops or lectures given by government units, like Los Angeles Custom House or steamship lines.

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Sales Department Manager (Business Department I) . . .

Percentage of Time Spent on the following duties: **25%**

- Establishes and implements policies, goals and procedures for the department; Formulates overall business plans and projections based on company's business development;

Percentage of Time Spent on the following duties: **40%**

- Contacts business, customers and trade associations to establish and expand business network;

- Negotiates with customers, approves business contracts to take orders from customers, and sends the orders to Operation Department for them to arrange for pickup of freight or cargo for delivery to container freight stations;
- Receives sales leads from overseas, decides selling rate based on the buying cost and the market;
- Reports to President/CEO with regards to business performance target, business plan, business volume and business improvement plan.

Percentage of Time Spent on the following duties: **35%**

- Trains sales representatives, reviews monthly business reports. Summarizes business conducted each month and reports to President for future operation adjustment;
- To arrange work schedules and supervise sales person's activities;
- Exchanges update information with other companies in the same industry;
- Makes regular calls to major customers to get first hand feedback and comments.

The petitioner further described the duties of the beneficiary's subordinates, including an operation department manager, financial department manager, administrative department manager, sales/import representative, and freight clerk.

On January 23, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated the following:

[I]t appears that the beneficiary has been and/or will be performing many aspects of the day-to-day operations of the business.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties to be performed by the beneficiary, and the percentage of time devoted to these duties. Further, some of the described duties such as conducts general administration affairs and visits customers have not been demonstrated to be managerial or executive responsibilities.

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The petitioning entity does not possess the organizational complexity to warrant having an executive.

The record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the business. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate the beneficiary would be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary would be functioning at a

senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties.

On appeal, counsel asserts that the petitioner has shown that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel alleges that the language used in the director's decision shows that he failed to fully consider evidence submitted in response to the request for evidence. Counsel cites the Board of Immigration Appeals decision in *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988), and states that the present case is distinguishable, as the beneficiary managed a much larger staff abroad and the petitioner provided a more detailed description of the beneficiary's duties in the United States.

Counsel further cites the decision of the U.S. Court of Appeals for the Ninth Circuit in *Boyang v. INS*, 67 F.3d 305 (9th Cir. 1995), in which the court upheld CIS's determination that the beneficiary who supervised one clerical employee was not employed in a primarily managerial or executive capacity. Counsel states that the present case is distinguishable, in that the beneficiary "oversees three managerial employees with a total staff of five (5)." Counsel suggests that the director erroneously based his decision on the small staff size of the petitioner. Counsel further states that, "[a]s a general manager, the beneficiary spends most of her time supervising and directing the work of other managerial employees, setting long-term strategy and identifying business opportunities in the U.S. market, and other managerial duties." Counsel cites the decision of the U.S. District Court for the Northern District of Georgia in *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988) to stand for the proposition that a beneficiary can perform some non-qualifying tasks and still be deemed to be employed in a primarily managerial or executive capacity.

Upon review, 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 beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The job descriptions submitted for the beneficiary do not establish that she will be employed in a primarily managerial or executive capacity. The petitioner indicates that the beneficiary will devote 35 percent of her time to acting as the petitioner's sales department manager. Within that portion of the beneficiary's duties,

she will spend 40 percent of her time performing non-qualifying sales functions such as “[contacting] business[es], customers and trade associations to establish and expand [the petitioner’s] business network.” The petitioner provided that the beneficiary will spend 35 percent of her time as the sales department manager performing a diverse group of duties, some of which include non-qualifying tasks such as “[making] regular calls to major customers to get first hand feedback and comments.” The petitioner stated that, as the sales department manager, the beneficiary will spend 25 percent of her time “[establishing] and implement[ing] policies, goals and procedures for the department; [and] [formulating] overall business plans and projections based on [the] company’s business development.” Yet, such a broad description of this portion of the beneficiary’s duties does not indicate what actual tasks she will perform. The actual duties themselves reveal the true nature of the employment. *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). Accordingly, the time the beneficiary invests in acting as the sales department manager does not constitute acting in a managerial or executive capacity.

The petitioner indicates that the beneficiary will devote 65 percent of her time to acting as the petitioner’s general manager/vice president. Within that portion of the beneficiary’s duties, she will spend 40 percent of her time “[conducting] general administration affairs of the company,” among other duties. However, this portion of the beneficiary’s duties provides no detail regarding her actual tasks beyond paraphrasing the statutory definitions for managerial and executive capacity as provided in sections 101(a)(44)(A) and (B) of the Act. 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. at 1103. The petitioner provided that the beneficiary will spend 20 percent of her time as the general manager/vice president performing non-qualifying sales functions such as “[visiting] customers and maintain[ing] good relationship with them” Thus, the petitioner has failed to show that as much as 60 percent of the beneficiary’s time acting as the general manager/vice president constitutes employment in a primarily managerial or executive capacity.

While the beneficiary performs some tasks that can be considered managerial or executive duties, the provided job descriptions reflect that the majority of her time is devoted to non-qualifying tasks.

The petitioner provides that that beneficiary will have supervisory authority over subordinate employees, including an operation department manager, a financial department manager, an administrative department manager, a sales/import representative, and a freight clerk. 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.

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 a 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, while the petitioner has indicated that all of the beneficiary's subordinates have at least a bachelor's degree, it has identified the subject studied for only a single employee, namely the financial department manager. As the petitioner has not indicated what degrees its other employees have earned, it has not shown that such academic training is necessary to successfully perform their respective duties. The petitioner indicates that the financial department manager earned a master's degree in management and accounting. A degree in accounting is understandably helpful to perform the duties of the financial department manager. Thus, the petitioner has provided sufficient explanation to establish that the financial department manager is a professional.

The petitioner has not shown that the operation department manager, administrative department manager, sales/import representative, or freight clerk spend significant amounts of time supervising subordinate staff members or managing a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Though the petitioner gives most of its employees managerial titles, such titles, by themselves, do not establish that they are in fact managers. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

While the petitioner has shown that the beneficiary oversees one subordinate who is a professional, the petitioner has indicated that the beneficiary spends a minimal amount of time actually performing supervisory duties. In the breakdown of the time the beneficiary devotes to her duties, the petitioner only references the beneficiary's interaction with the financial department manager in the section that provides that she devotes 20 percent of her time as vice president/general manager in part to "supervis[ing] other managers and professionals with their business activities." As the beneficiary only spends 65 percent of her time acting as the vice president/general manager, it is evident that a small fraction of her work is devoted to supervisory functions. 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). While the petitioner has established that the beneficiary engages in the managerial task of supervising a professional, it has not shown that the beneficiary is primarily engaged with managerial or executive tasks. Counsel's assertion that, "[a]s a general manager, the beneficiary spends most of her time supervising and directing the work of other managerial employees, setting long-term strategy and identifying business opportunities in the U.S. market, and other managerial duties" is not supported by the evidence of record.

In his decision, the director cited the Board of Immigration Appeals decision in *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988), to stand for the proposition that "[a]n employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be

employed in a managerial or executive capacity.” Counsel asserts that the present case is distinguishable from *Matter of Church Scientology International*, as the beneficiary managed a much larger staff abroad and the petitioner provided a more detailed description of the beneficiary's duties in the United States. However, the beneficiary's duties abroad are not at issue in this proceeding. As discussed above, the job descriptions provided for the beneficiary fail to show that she will be employed in a primarily managerial or executive capacity.

Counsel alleges that the language used in the director's decision shows that he failed to fully consider evidence submitted in response to the request for evidence. Yet, the decision makes specific reference to the documents most pertinent in evaluating the beneficiary's true employment capacity, including the beneficiary's job descriptions and the petitioner's quarterly wage report for the third quarter of 2003. The director made specific mention of elements of the beneficiary's job description submitted in response to the request for evidence, at times quoting language verbatim. Thus, counsel's assertion that the director disregarded the petitioner's evidence is without merit.

Counsel further cites the decision of the U.S. Court of Appeals for the Ninth Circuit in *Boyang v. INS*, 67 F.3d 305 (9th Cir. 1995), in which the court upheld CIS's determination that the beneficiary who supervised one clerical employee was not employed in a primarily managerial or executive capacity. Counsel states that the present case is distinguishable, in that the beneficiary "oversees three managerial employees with a total staff of five (5)." However, as discussed above, the evidence of record shows that the beneficiary will invest an insignificant amount of time managing subordinate employees. While the petitioner has established that the beneficiary will have supervisory authority over a single professional, the evidence of record does not support that she will be employed in a primarily managerial or executive capacity.

Counsel suggests that the director erroneously based his decision on the small staff size of the petitioner. However, the director's decision reflects that he focused on the descriptions of the beneficiary's duties as submitted by the petitioner. According to the beneficiary's job descriptions, a small portion of her time involves interacting with other employees. The majority of her time is invested in non-qualifying tasks or duties that are too vague to be deemed managerial or executive functions. Thus, regardless of the petitioner's staff size, the petitioner has failed to show that the beneficiary will be primarily employed in a managerial or executive capacity. The director's decision does not reflect that he inappropriately used the petitioner's small staff size as a negative factor.

Counsel cites the decision of the U.S. District Court for the Northern District of Georgia in *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988) to stand for the proposition that a beneficiary can perform some non-qualifying tasks and still be deemed to be employed in a primarily managerial or executive capacity. The statutory definitions of managerial and executive capacity reflect that a petitioner bears the burden to show that the beneficiary is *primarily* engaged in managerial or executive tasks. Sections 101(a)(44)(A) and (B) of the Act. Thus, counsel correctly suggests that it is permissible for a beneficiary to perform some non-qualifying tasks, so long as the majority of the beneficiary's time is devoted to managerial or executive duties. However, as discussed above, in the present matter the evidence of record reflects that the beneficiary will be primarily engaged with non-qualifying duties.

It is further noted that *Mars Jewelers, Inc. v. INS* relates to an immigrant visa petition, and not the extension of an L-1A nonimmigrant visa. The case is distinguishable from the present matter based on the applicable regulations. Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3)(ii). For this reason, 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 met this burden.

ORDER: The appeal is dismissed.