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File: WAC 04 154 50197 Office: CALIFORNIA SERVICE CENTER Date: AUG 26 2005

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

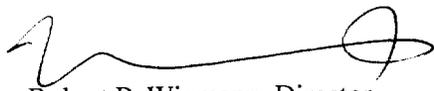
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 employ the beneficiary 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 California corporation that provides various information technology services. The petitioner claims to be an affiliate of the beneficiary's foreign employer, Circland Corp., located in Tokyo, Japan. The beneficiary was previously granted L-1A status for a one-year period to open a new office for a different company. The petitioner now seeks to employ the beneficiary as its vice president for international operations and extend his stay for a three-year period.

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 director's decision constitutes an abuse of discretion and that sufficient information and documentation were previously submitted to establish that the beneficiary will serve as a manager or executive. In support of these assertions, counsel submits a brief and a letter from the petitioner.

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 this 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.

The petition was submitted on May 6, 2004. The petitioner submitted a copy of its March 19, 2004 offer letter to the beneficiary, which provides the following description of the proposed duties:

The V.P. International Operations position will launch the company's operation in the Asia/Pacific region including Japan. They will:

- Direct a corps of personnel who will ultimately take over the day-to-day operations of the company for international operations. (20%)
- Manage and direct the international operations of the corporation. (20%)
- Establish the company's international procedural guidelines and oversee their initial implementation. (20%)
- Devise marketing strategies and establish a network of corporate clients. (20%)
- Make all executive decisions regarding new contracts, investments, bank credits, expenditures, and advertising. (20%)

The petitioner also submitted an April 21, 2004 letter in support of the petition, which provided the same job description.

On May 11, 2004, the director requested additional evidence, in part instructing the petitioner to provide: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's line and block organizational chart, including the names of all employees, a brief job description of their job duties, educational level, annual salaries and immigration status; and, (3) a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spends on each listed duty, and an explanation of exactly whom the beneficiary directs, including their job titles and position descriptions.

In a response dated June 10, 2004, the petitioner re-submitted copies of its March 19, 2004 and April 21, 2004 letters describing the beneficiary's proposed duties, and an organizational chart, which indicates that the beneficiary will report to the president of the company and will not supervise any subordinate employees.

On March 29, 2004, the director denied the petition, determining that the beneficiary would not be employed in a primarily managerial or executive capacity. The director observed that the petitioner had provided only a vague and general description of the beneficiary's duties that failed to demonstrate that he would be primarily performing managerial or executive duties. The director noted that the described duties largely comprise business development, customer service, and other operational tasks, rather than qualifying managerial or executive duties. The director also found insufficient evidence to establish that the beneficiary would manage a function within the organization, or that he would manage a staff of professional, managerial or supervisory personnel.

On appeal, counsel for the petitioner asserts that the director's conclusion that the beneficiary's duties are not primarily executive or managerial constitutes an abuse of discretion based on the evidence submitted. Counsel states that the beneficiary owns 50 percent of the U.S. company, manages an important function, directs the management of the organization or a major function of the organization, establishes policies and goals, exercises wide latitude in decision-making and has specialized knowledge of the organization's products. Counsel states that the beneficiary's job description resembles that of a "top executive" as described in the Department of Labor's *Occupational Outlook Handbook*, and that the evidence submitted establishes that he has the requisite level of discretion and authority over the company to qualify as an "executive/manager."

Counsel also asserts that the director's reliance on *Matter of Church Scientology International*, 19 I&N Dec. 53 (Comm. 1988) is legally and factually misplaced. The petitioner submits a more detailed description of the beneficiary's proposed duties in support of its assertion that the beneficiary will be employed in a primarily managerial or executive capacity.

Upon review, counsel's assertions are not persuasive. As a preliminary matter, the AAO will address the evidence submitted by the petitioner on appeal, namely, the job description contained in the petitioner's July 1, 2004 letter. Prior to adjudicating the petition, the director requested that the petitioner submit a more detailed job description for the beneficiary, including the percentage of time the beneficiary would spend on each of his duties, as well as job descriptions for the beneficiary's subordinates. The petitioner was provided 84 days in which to submit a response to the director's request for additional evidence. In response, the petitioner opted to submit photocopies of letters submitted with the initial petition rather than the comprehensive description of the beneficiary's duties and subordinates' duties requested by the director.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The appeal will be adjudicated based on the record of proceeding before the director.

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 does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The director properly concluded that the job description was too vague to convey an understanding of the actual duties the beneficiary would perform in the offered position. For example, the petitioner indicated that the beneficiary would devote 20 percent of his time to "manage and direct the international operations" of the corporation. However, the petitioner did not adequately describe the proposed nature, scope, objectives or structure of the new "international operations" department or division to be managed by the beneficiary, nor

explain exactly what efforts he would take to “manage and direct” the department. The petitioner stated that the beneficiary would allocate 20 percent of his time to establishing “international procedural guidelines” and overseeing their implementation, and spend 20 percent of his time directing a “corps of personnel.” However, the petitioner did not specify the type of guidelines the beneficiary would be establishing, or identify any specific tasks associated with this responsibility. Nor did the petitioner identify any personnel to be supervised by the beneficiary, despite the director’s request that the petitioner provide the job titles and duties for all of the beneficiary’s subordinates. Reciting the beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). These responsibilities, which account for 60 percent of the beneficiary’s time, have not been sufficiently described, and thus cannot establish that the beneficiary’s actual duties will be primarily managerial or executive in nature. The AAO cannot define the beneficiary’s precise duties in the absence of the job description required by 8 C.F.R. § 214.2(l)(3)(ii).

The director also properly concluded that at least some portion of the beneficiary’s time would be devoted to non-qualifying duties related to marketing and business development. The petitioner indicated that the beneficiary would “devise marketing strategies and establish a network of corporate clients.” Without further explanation, these duties appear to be routine marketing and sales tasks associated with expanding a business into a new market. The petitioner provides that the beneficiary will “make all executive decisions regarding new contracts, investments, bank credits, expenditures, and advertising.” However, the petitioner did not indicate the types of contracts and investments over which the beneficiary would have authority, or identify who would be responsible for performing non-qualifying duties associated with obtaining sales contracts, advertising the petitioner’s services, or performing daily accounting of expenditures. Therefore, these duties, which account for an additional 40 percent of the beneficiary’s time, appear to depict an employee who is directly involved in the operational activities of the business as it attempts to expand into a new market. The petitioner did not show that that the beneficiary will *primarily* perform the high-level responsibilities specified in the definitions of managerial or executive capacity, rather than spending a majority of his time on day-to-day functions. *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Counsel objects to the director’s reliance on *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988) as a misapplication of the Commissioner’s findings in that decision, noting that the cited matter involved a religious organization and primarily focused on a qualifying relationship issue. However, the *Matter of Church Scientology Int’l* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. *See* 8 C.F.R. § 103.3(c). Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary’s duties must be “primarily at the managerial or executive level,” the AAO stated: “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. at 604. The AAO examined the beneficiary’s specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or

executive. Counsel's contention that *Matter of Church Scientology* is not relevant to this matter is therefore not persuasive.

Counsel also attempts to distinguish the facts of the instant petition from those in *Matter of Church Scientology*, asserting that, unlike the beneficiary in *Matter of Church Scientology*, the beneficiary in this case is also an owner of both companies, sits on the board of directors of the petitioning company, and has full discretion to make decisions regarding a division of the company. Counsel then goes on to summarize the beneficiary's role by paraphrasing the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. 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.). Neither the beneficiary's partial ownership in the company, his exercise of discretion over a component of the organization, or his executive job title is sufficient to meet the petitioner's burden of proof. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The minimal evidence provided by the petitioner prohibits CIS from achieving such understanding, and precludes a finding that the beneficiary will be employed in a qualifying managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel also argues that the beneficiary's job duties closely resemble those described for "top executives" in the Department of Labor's *Occupational Outlook Handbook*. The Handbook, although used by CIS as a source of reference for certain purposes, has no bearing on an assessment of the beneficiary's duties, and therefore, the beneficiary's eligibility under section 101(a)(44) of the Act.

Finally, counsel's assertion that the beneficiary manages the "Pacific Rim/Asian function" of the petitioning organization is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a comprehensive job description clearly detailing the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). As discussed above, the petitioner did not provide a comprehensive description of the beneficiary's duties, nor did it define the function with specificity. Although

the beneficiary is not required to directly supervise employees in order to qualify as a function manager, the AAO recognizes that other employees must still carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The petitioner has not explained who would perform non-qualifying tasks related to marketing and selling the petitioner's services or related administrative and operational duties in the Asian market, if not the beneficiary. The petitioner's vague reference to a "corps of personnel" whose location, job titles and job duties remain undefined is not convincing. Therefore, the petitioner has not provided evidence that the beneficiary manages an essential function.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.