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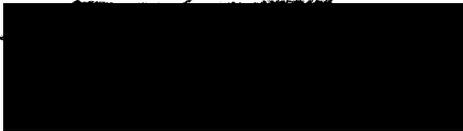
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File: SRC 03 068 51819 Office: TEXAS SERVICE CENTER Date: **AUG 30 2005**

IN RE: Petitioner:   
Beneficiary: 

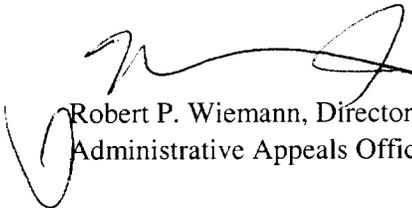
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas Service Center, denied the petition for a nonimmigrant visa and subsequently affirmed her decision on three subsequent motions to reopen and reconsider. 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 president 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 limited liability company organized in the State of Florida that is engaged in the export of electronics products. The petitioner claims that it is the affiliate of [REDACTED] C.A., located in Venezuela. The beneficiary was previously granted L-1A classification for a one-year period to open a new office in the United States and was subsequently granted a three-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition on September 12, 2003 finding that the petitioner did not respond to a May 28, 2003 request for evidence and therefore was deemed to have abandoned the petition. The director reopened the case on service motion in order to review the petitioner's late response to the request for evidence, received on September 12, 2003. On December 1, 2003, the director affirmed her previous decision to deny the petition concluding that (1) the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity; or (2) the foreign entity was doing business. The director granted two subsequent motions to reopen or reconsider and, on March 29, 2004 and June 18, 2004, affirmed her previous decision concluding that the beneficiary will not be employed in a managerial or executive capacity. The director found that the petitioner has established that the foreign company is continuously and systematically conducting business.

The petitioner subsequently filed an appeal in response to the director's June 18, 2004 decision. 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 disputes the director's findings and asserts that the petitioner has been employed in a qualifying executive or managerial capacity. Although counsel indicated that a brief would be submitted within 60 days, counsel did not explain why the brief would be submitted late or otherwise provide good cause for granting an extension beyond thirty days. As of this date, the record does not contain a supplemental appellate brief. Regardless, pursuant to 8 C.F.R. § 103.3(a)(2)(vii), counsel's request for additional time to submit a brief is denied as a matter of discretion for failure to show good cause. The record of proceeding will be considered complete.

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 under the extended petition.

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 January 3, 2003 letter appended to the initial petition, the petitioner described the beneficiary's job duties as follows:

In this position [the beneficiary] will continue to direct the management of the company, establish the goals and policies, exercise wide latitude in discretionary decision-making and direct the operations of the company. In addition he will continue administering the company's affairs, acting as liaison and representative for the foreign affiliate company. . . marketing the services of the foreign company, engaging in long-range planning and identifying business opportunities in the United States and international markets, directing the business activities, and supervising other managers. Specifically, his duties include:

Marketing – planning and developing industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and the public; developing new customer bases in the United States, exporting American products to the Venezuelan market; promoting existing and new product lines; keeping abreast of new developments in market research techniques, product lines and other relevant factors through seminars, trade shows, periodicals and trade journals; analyzing competitive product in terms of design, price and marketability as compared to company position; and representing company at trade association meets to promote products sold and to purchase products.

Operations – direct the management and growth of the company; direct the day to day operations and customer service matters; planning, developing, and establishing policies and objectives of business organization; planning business objectives, developing organizational policies to coordinate functions and operations between division and departments, establishing responsibilities and procedures for attaining objectives; review activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions; direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity; serve as chairman of committees, such as management, executive and sales; maintain the excellent service

supplied by the company in Venezuela to existing customers, including the day to day activities and assistance; and travel to visit customers in Venezuela to promote product sales and establish and/or maintain customer relations.

On May 28, 2003, the director requested additional evidence, in part requesting the petitioner's Form 941, Employer's Quarterly Tax Return, with attachments, names of employees, social security numbers and wages earned, for the first quarter of 2003. The director denied the petition on September 12, 2003 when the petitioner failed to submit a response to the request for evidence, pursuant to 8 C.F.R. § 103.2(b)(13). The director subsequently reopened the case on service motion upon locating the petitioner's late response to the request for evidence received by CIS on September 12, 2003.

On December 1, 2003, the director affirmed her decision to deny the petition, concluding that the beneficiary would not be employed in a managerial or executive capacity. The director observed that the petitioner had only two employees other than the beneficiary, and stated that it was reasonable to conclude that the beneficiary would be required to perform a wide range of daily functions associated with running a business that are not managerial or executive in nature, and that such duties would require the majority of the beneficiary's time.

The petitioner filed a late appeal on January 9, 2004, which the director treated as a motion to reconsider. In a February 20, 2004 brief, counsel for the petitioner reiterated the job duties stated in the petitioner's January 3, 2003 letter and indicating that the beneficiary devotes 75 percent of his time to "directing the overall management of the organization, developing business objectives, and supervising the work of all employees," 15 percent of his time "in business development and negotiating contracts," and 10 percent of his time "reviewing company financials and ensuring that budgetary guidelines are met." Counsel also noted that the beneficiary has authority to make personnel decisions and provided a list of his subordinates, including an executive assistant, sales manager and operations manager employed by the U.S. company, a financial manager and executive assistant employed by the foreign entity, and an outsourced accounting firm. On March 29, 2004, the director affirmed her previous decision to deny the petition, again noting that the beneficiary only supervised two employees at the time the petition was filed. The director found that the petitioner had not established that the beneficiary was supervising managerial or professional employees, or that the beneficiary was performing primarily managerial or executive duties.

The petitioner subsequently filed another late appeal on May 5, 2004, which the director treated as a motion to reconsider. In a June 4, 2004 brief, counsel for the petitioner asserted that the petitioner is employed in an executive capacity and argued that the director erroneously focused solely on the number of employees and their hourly wages, rather than considering the beneficiary's role and the overall "organizational scheme" of the company. Counsel further argued that the beneficiary's subordinates are professionals because they "routinely complete licensing applications and compile expense data, operate national and international sales efforts, and inspect and assess incoming product shipments." Counsel also asserted that the director did not consider the reasonable needs of the business and its stage of development, noting that the company was "still in its beginning phases of development" having only operated since 1998. Counsel contended that the beneficiary qualifies as a manager because he "manages and controls the marketing and operations functions, both of which are essential functions of the corporation."

On June 18, 2004, the director again affirmed her decision to deny the petition concluding that the petitioner did not demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director observed that the description of the beneficiary's duties merely paraphrases the statutory definition of executive capacity, and again noted that the petitioner had not established that the beneficiary is managing professionals or managers.

On appeal, counsel for the petitioner states on Form I-290B: "The petitioner provided evidence of the beneficiary's professional/executive duties in the company. Further, the beneficiary supervises employees in the United States and at the foreign company. Once again, the Service has erred in denying the instant case."

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 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).

Although the petitioner has provided a lengthy description of the beneficiary's duties, the job description does not clearly show that the beneficiary will be employed in a managerial or executive capacity. For example, the petitioner's initial description of the beneficiary's job description indicated that the beneficiary manages the company's marketing activities yet includes duties such as "developing new customer bases," "exporting American products to the Venezuelan market," "promoting existing and new product lines," "keeping abreast of new developments in market research techniques," "analyzing competitive products," and "representing the company at trade association meetings to promote products sold and to purchase products." While the petitioner claims that the beneficiary manages marketing activities, the described duties are characteristic of an employee who directly performs marketing tasks. 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). Since the beneficiary actually purchases and markets products for the petitioner, these duties, which were initially included among the beneficiary's primary duties, will not be considered managerial or executive in nature. 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 593, 604 (Comm. 1988).

The petitioner also claims that the beneficiary manages "operations" activities, but this portion of the beneficiary's job description is too general and vague to convey an understanding of the actual duties performed by the beneficiary on a day-to-day basis. The petitioner indicates that the beneficiary will "develop organizational policies to coordinate functions and operations," "direct the day-to-day operations," "direct the management and growth of the company," "establish responsibilities and procedures for attaining objectives," and "maintain the excellent service supplied by the company in Venezuela." 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. Specifics are 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.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. As discussed above, the beneficiary's job description is comprised of non-qualifying marketing duties, and vaguely defined managerial or executive responsibilities. Here, the petitioner fails to meaningfully document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. On motion, counsel attempted to quantify how the beneficiary's time is allocated, stating that the beneficiary devotes 75 percent of his time to "directing the overall management of the organization, developing business objectives, and supervising the work of all employees," 15 percent of his time in "business development and negotiating contracts," and ten percent of his time "reviewing company financials and ensuring that budgetary guidelines are being met." However, this account of the beneficiary's duties is even more vague than the description submitted with the initial petition, and does not include the marketing duties that were stated in the initial job description. 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). Counsel's breakdown of the beneficiary's job duties provided on motion is not deemed a credible account of the beneficiary's actual duties at the time the petition was filed. The petitioner's failure of documentation is important because several of the beneficiary's daily tasks, such as market research, product promotion and purchasing, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. See, e.g., *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the beneficiary is not required to supervise personnel, if it is claimed that his 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. At the time the petition was filed, the beneficiary supervised an executive assistant who was responsible for "licenses, correspondence, expense reports," and a sales manager for the United States and Venezuelan territories. Counsel claimed on motion that the beneficiary's subordinates are professionals because they "routinely complete licensing applications and compile expense data, operate national and international sales efforts, and inspect and assess incoming product shipments." Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term professional 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 "professional" 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 a 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 the 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. Based on the very limited job descriptions provided for the beneficiary's subordinates, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of an executive assistant or sales manager within the scope of the petitioner's business. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On motion, counsel claimed that the beneficiary could alternatively be classified as a "function manager" because he manages the petitioner's marketing and operations functions. 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 furnish a detailed description of 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)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed above, based on the petitioner's representations, the beneficiary personally performs essentially all tasks associated with the petitioner's marketing function. With respect to the "operations" function, the petitioner failed to identify the function with specificity; merely stating that the beneficiary manages the organization in its entirety does not constitute managing an essential function.

Finally, as correctly observed by counsel, although the director based her decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a four-year-old company engaged in the purchase, export and sale of video games and computer parts. The company employed the beneficiary as president, an executive assistant who prepared correspondence, license applications and expense reports, and a sales manager. The petitioner did not indicate who performed many of the day-to-day, operational duties of the company, including identifying and purchasing the products from U.S. wholesalers and retailers, warehousing and inventory tasks, invoicing, tracking orders, routine bookkeeping and banking, and coordinating arrangements with outside transportation and customs providers. With the limited organizational structure described, it is reasonable to conclude, and has not been proven otherwise, that the beneficiary was required to participate in these non-

qualifying duties. In addition, as discussed above, the beneficiary's job description indicates that he directly performs the petitioner's marketing tasks, but the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Counsel's assertion that the company is "still in its beginning phases of development," does exempt the petitioner from establishing that the company was capable of supporting a bona fide manager or executive at the time the petition was filed. 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 AAO acknowledges the petitioner's claim that it hired an operations manager after the instant petition was filed, and that this employee likely performs some of the day-to-day administrative and operational duties of the company as enumerated above. 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 the present matter, the totality of the record does not support a conclusion that the beneficiary has been or 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, that burden has not been met.

**ORDER:** The appeal is dismissed.