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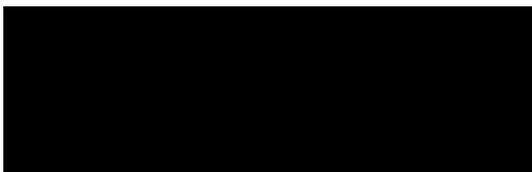
U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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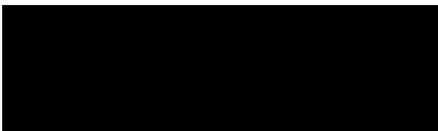
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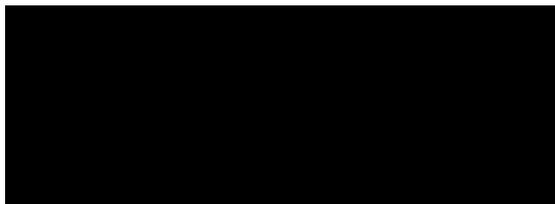
FILE: WAC 03 191 50276 Office: CALIFORNIA SERVICE CENTER Date: JUN 06 2005

IN RE: Petitioner:  
Beneficiary:



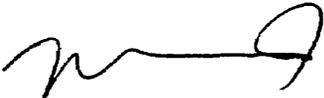
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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

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**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the evidence contained in the record, the petitioner was established in 2002 and claims to be engaged in the import, export, and wholesale of musical instruments. The petitioner claims to be a subsidiary of [REDACTED] located in South Korea. The petitioner's new office petition was initially approved allowing the beneficiary to enter the United States in a L-1A classification from July 3, 2002 to July 3, 2003. It now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its marketing director for an additional three years, at an annual salary of \$54,000.00. The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence establishes that the beneficiary will be employed in a primarily executive or managerial capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, or a subsidiary, or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 has submitted sufficient evidence to establish that the beneficiary has been and will be employed primarily in an executive or managerial 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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's proposed duties in the petition as: "Direct and Develop U.S. company; direct and coordinate marketing efforts; enter into major contracts with vendors for import/export of musical instrument; allocate resources for development of company policies and sales strategies; research music industry needs and demands for company projection in manufacturing and sales."

In a letter of support, dated June 6, 2003, the petitioner described the beneficiary's duties as:

[The beneficiary's] main job duties in the U.S. will be direct and coordinate marketing efforts in maintaining major contract deals and to broaden the marketing and sales effort as well as introduce the technologically advanced superior product of [REDACTED] [The beneficiary's] duties also involve in [sic] researching market conditions to determine potential sales and gather data of the market and analyze price and marketing methods.

The petitioner submitted a chart describing the beneficiary's duties and the percentage of time spent performing each. The chart reads as follows:

<u>DUTIES</u>	DESCRIPTION	PERCENTAGE OF TIME
<u>POLICY SETTING</u>	Provide strategic pricing and target product policies to managerial staff and employees for increased revenue; conduct routine daily/weekly/monthly/quarterly meetings to meet targeted goals	10%
<u>ADMINISTRATION</u>	Oversee managerial staff and coordinate progress of import/export of information technologies. Hire/fire/train managerial staffs for efficiency and quality. Provide guidance for projects and revenue generation.	30%
<u>DEVELOPMENT &amp; EXPANSION</u>	Develop plans for company expansion by allocating cost-effective measure in implementing product development/distribution. Meet potential clients/vendors for major sales contract. Survey potential areas for branch expansion and development.	20%
<u>RESEARCH</u>	Research current trends by attending conventions, seminars, receiving international source of information from vendors/headquarter office. Keep informed and update on current international trade regulation/policy/copyright regulation and registration.	20%
<u>DIRECT &amp; ORGANIZE</u>	Direct activities of staff employees/researchers. Direct coordination of marketing of equipment/finished products. Organize system of distribution and sales network. Make critical decision for improvements and expanding company's venture planning in depth of future commodities and products for company. Receive statistical reports from various sectors of the company/headquarter office to determine product feasibility and cost efficiency. Allocate human resource/project resource for quality and efficiency. Coordinate and provide support function of headquarter office as needed. Report to headquarter office for periodic progress and goal setting. Focus on functional development of overall company's organization.	20%

The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for the year 2002, IRS Form 941, Employer's Quarterly Federal Tax Return for the four quarters preceding the filing of the petition, and IRS Form DE-6 covering that same period. The petitioner also submitted copies of the U.S. entity's Articles of Incorporation and corporate financial statement for the fiscal year 2002.

In response to the director's request for evidence concerning the beneficiary's status as a manager or executive, the petitioner reiterates the beneficiary's duty descriptions and percentage of time he spends performing each task. The petitioner stated the U.S. entity currently employed four employees in addition to the beneficiary, and maintains a staff of independent contractors and sales representatives who are paid for by commission. The petitioner also stated that the U.S. entity was in the process of recruiting additional staff. The petitioner submitted a copy of an organizational chart describing the U.S. entity's hierarchy and staffing

levels. The organization chart showed that the sales manager, office manager, project and promotions division, and warehouse manager are all under the direction of the beneficiary as president of the organization. In the organizational chart, four staff positions and two to three assembly workers positions were described as "to be hired." The chart listed names, locations, employers, and telephone numbers for six sales representatives. In the response letter, the petitioner stated that the U.S. entity was "still in the development and expansion stage" and was in the process of recruiting additional employees and a network of independent sales representatives as evidenced in the company's organizational chart. The petitioner also provided a listing of its current employees' titles, education levels, salaries, and length of employment. The petitioner further stated that the current size and staffing levels of the U.S. entity are sufficient to meet with the needs of the business, in that the sales have been generated through the company's website, advertisements, and resource publications.

The director subsequently denied the petition determining that the petitioner had submitted insufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted that there was no evidence in the record to demonstrate the existence of a subordinate staff of professional, managerial or supervisory personnel to relieve the beneficiary from performing non-managerial duties. The director surmised the majority of positions listed in the U.S. entity's organizational chart remained vacant at the time the petition was filed; the sales representatives were listed with their own individual employers and did not appear on the organization's Form DE-6; and that the petitioner only paid \$17,119.00 in salaries and wages for the whole of 2002. The director also noted that the record failed to establish that the U.S. entity contained the organizational complexity to support an executive position. The director further noted that the beneficiary's duties, as described, failed to establish that his activities would be primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's decision and asserts that Citizenship and Immigration Services (CIS) placed undue emphasis on the size of the U.S. entity. Counsel further asserts that the U.S. entity is a newly incorporated entity and is still in its developmental stages. And, as such, is in the process of recruiting additional subordinate managers and independent sales representatives. Counsel contends the beneficiary is a "functional manager," in that he is responsible for "expanding, organizing, directing, and developing the entire corporate organizations [sic]." Counsel also contends that the director, in the denial notice, addressed none of the beneficiary's detailed job duties. Counsel argues that the director wrongfully focused on the personnel aspect of the beneficiary's job duties and failed to address the importance of his functional management duties. Counsel claims that the \$17,119.00 paid for salaries and wages in 2002 was an incorrect figure used by the director in determining that such was indicative of a small operation, in that the entity did not commence business activities until the latter part of 2002.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. In the instant matter, the petitioner has failed to overcome the objections made by the director in his denial. The record reveals that the petitioner is filing for a new office extension and therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. Throughout the petition the petitioner indicates that it plans to hire additional managers and employees in the future. 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). Furthermore, 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. There is no provision in CIS regulations that

allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In the instant matter, the director based his decision partially on the size of the U.S. entity, the number of employees, and the \$17,119.00 in wage expenses paid out during 2002.

Although the director based his 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 one-year-old import and export company that claimed to have a gross annual income of \$385,225.00. The firm employed the beneficiary as marketing director, plus a sales manager, office manager, project & promotions manager (part-time), and warehouse manager. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as marketing director and four managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing goals and policies, developing plans for company expansion, researching current business trends, and marketing the petitioner's product. The petitioner did not, however, define the beneficiary's goals, policies, or clarify whether he actually performs or manages the research projects. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act,

8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, exercising wide latitude, and exercising discretionary decision making. However, 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.).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In the instant matter, the evidence demonstrates that the majority of positions listed in the U.S. entity's organizational chart have yet to be filled, and that the sales representatives listed in the chart appear to be employed, not by the petitioner, but by unaffiliated businesses. The petitioner submitted a list of employees and their educational levels. Although the petitioner stated that all employees received a Bachelor of Arts or a Bachelor of Science degree, there was no evidence submitted to substantiate this claim. 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). Nor has there been any evidence presented to demonstrate that the positions require a degree, or that the employees perform supervisory, professional, or managerial duties. It appears from the record that the beneficiary will, at best, be supervising non-professional employees. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Further, although the petitioner asserts that the company employs five independent contractors as sales representatives, there has been no evidence submitted to substantiate this claim or to show that the independent contractors were employed on a full-time basis by the U.S. entity or that they received any form of managerial or supervisory instruction from the U.S. entity. There is also a lack of evidence to establish to what extent the independent contractors' time will be spent relieving the beneficiary from performing non-qualifying duties of the organization. The evidence shows that other employers employ the independent contractors. There is no indication from the record that the duties of the sales representatives qualify as performing a major function of the U.S. entity or providing a major service that would allow the entity to achieve its goals. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business.

Counsel argues that the beneficiary's job duties are that of a "functional manager" rather than that of a "personnel manager" as indicated by the director in his denial. Counsel contends the beneficiary will be responsible for "expanding, organizing, directing, and developing the entire corporate organizations [sic]." However, based upon information contained in the record it appears that over 60 percent of the beneficiary's time has been and will be spent performing non-qualifying administrative duties and supervising non-professional employees. 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 written job offer that clearly describes 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.

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 sustained that burden.

**ORDER:** The appeal is dismissed.