

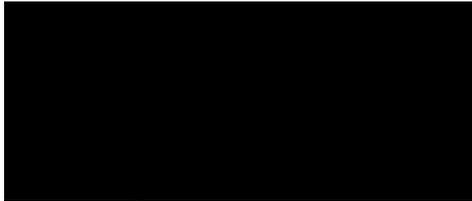
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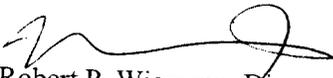
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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.


6 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 president and 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 a small gallery and is engaged in buying and selling antiques and collectibles. The petitioner claims that it is the subsidiary of [REDACTED], located in Fukuoka, Japan. The beneficiary was initially granted a one-year period of stay to open a new office and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been or would 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 disputes the findings of the director's decision and asserts that the director did not include an adequate analysis of the reasons for denial. Counsel further states that the evidence submitted clearly demonstrates that the beneficiary serves in a managerial and executive capacity. In support of these assertions, the petitioner submits additional 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(1)(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 (1)(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.

At 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 the initial petition, the petitioner submitted a letter dated September 20, 2002, which described the beneficiary's job duties as follows:

(1) General Management: As a major strategic move, [the beneficiary] directed to lease a retail space for Gallery Tokusa within the grounds of Hawaii's venerable "five star" hotel, the Halekulani, located in Waikiki. . . .Under the direction of [the beneficiary], certain internationally recognized artists have been featured at Gallery Tokusa such as the world famous imari ceramist, Imaizumi Imaemon XIII, a national living treasure of Japan, and other similar events involving Japanese antique ceramics and collectibles.

(2) Marketing Management: In the past year, [the beneficiary] has done much in the marketing infrastructure area. Most recently, under an ambitious corporate strategic plan, [the beneficiary] expanded the business of [the petitioner] by creating and directing a website for antiques to be sold to a worldwide market.

(3) Personnel Management: [The beneficiary] continues to hold the company's highest position and will have full authority, without direct supervision, to make day-to-day decisions. Since commencement of operation in 1999, [the petitioner] has hired five employees whom are all citizens and/or lawful permanent residents of the U.S. At this time, [the beneficiary] continues to exercise her daily discretion of personnel management to hire, train and direct the activities of the employees while maintaining her other responsibilities as follows:

- (a) Analyzing planning, directing and coordinating all operational, administrative and financial activities, including capital expenditures and payroll budgets;
- (b) Appraising and purchasing antiques and collectibles sold at Gallery Tokusa from various sources in Japan;
- (c) Planning and implementing [the petitioner's] proposed plans in relation to its overall business goals and its long-term planning and/or modification of the same as required by [the foreign entity];
- (d) Formulating and implementing standards, policies and procedures in line with [the foreign entity];
- (e) All other duties incidental to (a) thorough (e).

The petitioner also noted the company's achievement of gross income of \$119,566 and \$66,852 for 2000 and 2001, respectively, as evidence of the beneficiary's financial management duties and overall responsibility for the company's performance.

On November 5, 2002, the director requested additional evidence to establish that the beneficiary is employed as a manager or executive. Specifically, the director requested (1) the U.S. company's organizational chart clearly identifying all employees, along with a brief description of job duties, educational level, annual sales/wages and immigration status, and source of remuneration (salary, wage or commission) for all staff supervised by the beneficiary; and (2) a more detailed description of the beneficiary's job duties, including the percentage of time spent in each duty.

In response, the petitioner submitted a letter dated January 11, 2003, which included the following description of the beneficiary's job duties:

[The beneficiary] currently serves as [the petitioner's] president in charge of general operations. As President, [the beneficiary] not only directs the management of [the petitioner], but she also supervises and controls the work of five (salary + commission) employees. . . . [The beneficiary] has authority to hire, fire and recommend personnel actions as [the petitioner's] president and exercises discretion over the day-to-day operations of the company.

As an executive, [the beneficiary] is also responsible for establishing goals and policies of [the petitioner]. Discretionary decisions concerning [the petitioner] are exercised entirely by [the beneficiary]. The only general direction [the beneficiary] receives is from [the foreign entity] and its shareholders, of which [the beneficiary] is among one of the four shareholders. In addition, [the beneficiary] serves as [the petitioner's] buyer. Her duties as buyer include maintaining inventory, ordering from various distributors, handling special orders, Internet research of merchandise, fielding questions about products, completing mark-down of retail prices, keeping competitive watch over educational market, and meeting with vendors.

The percentage of time [the beneficiary] spends in each of her duties are:

Duties	% of Time
Analyzing, planning, directing and coordinating all operational, administrative and financial activities, including capital expenditure and payroll budgets	25%
Appraising and purchasing antiques and collectibles sold at Gallery Tokusa from various sources in Japan	25%
Personnel management, including Training staff in the specialized knowledge and history of techniques.	20%
Planning and implementing [the petitioner's] proposed plans in relation to its overall business goals and its long-term planning and/or modification of the same as required by Tajima Japan	15%
Meeting and discussing legal and financial matters with [the petitioner's] attorney and accountant on all important legal and financial matters; attending meetings at "Society of Asian Arts of Hawaii", offering lectures at Honolulu Academy of Arts.	14%
Formulating and implementing standards, policies and procedures in line with Tajima Japan	1%

As stated in the January 11, 2003 letter, the petitioner's additional staff includes: (1) a manager responsible for general administration and sales, who receives a salary of \$6,500; (2) an assistant manager responsible for administration, scheduling and sales, who receives a salary of \$5,500; and (3) three sales staff who are responsible for sales, merchandise display, inventory and customer list maintenance, who receive salaries ranging from \$1,000 to \$5,500. An organizational chart submitted with the letter depicts these employees

along with two vice presidents, who do not appear to receive a salary or report to the beneficiary. It is noted that the individuals identified as vice presidents are shareholders of the foreign entity.

On September 18, 2003, the director denied the petition concluding that the beneficiary's duties will not be primarily managerial or executive in nature. The director specifically noted that the beneficiary's subordinate staff is not comprised of managers or professionals, and that she would perform non-qualifying duties in her capacity as the petitioner's buyer.

On appeal, counsel for the petitioner asserts that the director's denial consists of mere conclusions without analysis of the facts or relevant statute. Counsel contends that the evidence submitted prior to adjudication is sufficient to demonstrate that the beneficiary is employed as both a manager and an executive. Counsel also notes that the beneficiary has two previous L-1A approvals based on the same facts, and submits copies of the supporting letters which accompanied the previous I-129 petitions submitted on behalf of the beneficiary. In support of the appeal, the petitioner also submits two letters from individuals who are acquainted with the beneficiary in a professional capacity, attesting to her success as the petitioner's manager. Finally, the petitioner submits the sworn statement of Mr. [REDACTED], a certified public accountant who states that he has served as the non-salaried vice president of the petitioner since 1999. In the statement, dated November 5, 2003, Mr. [REDACTED] further describes the beneficiary's specific duties within the petitioner's organization.

Upon reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity. 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.* In this case, the petitioner claims that the beneficiary qualifies as both a manager and an executive. However, the petitioner cannot rely on partial sections of the two statutory definitions under sections 101(a)(44)(A) and (B) of the Act. The petitioner 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 if it is representing that the beneficiary is both an executive and a manager. In addition, 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial operational duties required for the day-to-day operation of the business. Although the petitioner complied with the director's request that it assign a percentage of time to each duty performed by the beneficiary, the breakdown of responsibilities provided by the petitioner raises questions as to whether the beneficiary could be performing *primarily* qualifying managerial or executive duties. First of all, the petitioner indicated that the beneficiary devotes a full 25 percent of her time to "appraising and purchasing antiques and collectibles sold at Gallery Tokusa from various sources in Japan." In other words, she is

directly responsible for ordering the merchandise that is displayed and sold in the petitioner's retail store. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Second, the record indicates that the beneficiary is also responsible for "maintaining inventory, ordering from various distributors, handling special orders, Internet research of merchandise, fielding questions about products, completing mark-downs of retail prices, keeping competitive watch over educational market, and meeting with vendors," as well as "creating and directing a website." However, these duties, which are not inherently managerial or executive in nature, are not included in the petitioner's breakdown of the beneficiary's duties. Since the petitioner clearly failed to include many of the beneficiary's non-qualifying tasks in the chart describing the allocation of the beneficiary's duties, this evidence will not be given significant weight in determining what percentage of the beneficiary's duties are actually managerial or executive in nature.

On appeal, the petitioner submits a letter from its non-salaried vice president/accountant who describes various duties performed by the beneficiary that were not previously included in her various job descriptions. However, 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 additional evidence to be considered, it should have included these additional job duties in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Furthermore, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The AAO notes that the job description submitted on appeal attributes all of the day-to-day operations of the petitioner's gallery to the store manager (whose duties were previously described as "administration and sales") and describes additional responsibilities that are absent from all previous descriptions of the beneficiary's duties. However, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Although the record reveals that the beneficiary allocates a significant portion of her time to non-qualifying duties, the AAO will consider whether the beneficiary may qualify as a manager based on her supervision of supervisory, professional or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act, and whether the petitioner employs a sufficient subordinate staff to relieve the beneficiary from performing primarily non-qualifying duties.

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 the subordinate employees. 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, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the claimed administrative and sales work of the petitioner's other employees. Nor has the petitioner established, based on the minimal job descriptions provided, that the beneficiary's subordinates could be considered managers or supervisors.

Further, contrary to counsel's assertions on appeal that responsibility for the entire sales function is delegated to the store manager and petitioner's previous assertions that the beneficiary manages the company's marketing activities, a critical analysis of the nature of the petitioner's business undermines the contention that subordinate employees relieve the beneficiary from performing non-qualifying duties. Rather it appears from the record that the only individual performing marketing-related functions is the beneficiary, which would leave her to perform all managerial *and* non-managerial tasks associated with this function. In addition, the petitioner has stated that its store manager, assistant manager and sales staff receive salaries ranging from \$1,000 to \$6,500. If all employees are earning minimum wage, it can be assumed that the manager worked on average no more than 22 hours per week, the assistant manager worked on average no more than 18 hours per week, and the three sales people worked approximately four hours per week, 15 hours per week, and 18 hours per week. The petitioner's lease agreement indicates that the business is required to operate between the hours of 9 a.m. and 9 p.m. daily, or 84 hours per week. Even if the petitioner did come to an agreement with the lessor to reduce its operating hours, it is evident that as the only full-time employee, the beneficiary would be required to engage in sales and customer service activities, particularly at times when the part-time manager and part-time assistant manager are not present in the petitioner's store.

Collectively, the evidence discussed above brings into question how much of the beneficiary's time can actually be devoted to managerial and executive duties, when she clearly performs many non-qualifying duties related to purchasing, sales and marketing of the petitioner's products. The AAO acknowledges that the beneficiary functions at the top of the petitioner's organizational hierarchy and exercises discretionary decision-making authority with respect to the company's overall operations. However, the fact that the beneficiary successfully manages a small business and holds an executive job title does not compel CIS to deem her a manager or executive as defined by the regulations. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Sup. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

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). As already discussed, 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 president, and several part-time employees who clearly do not work sufficient hours to perform all of the day-to-day, non-managerial operations of the company. 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. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO recognizes the petitioner's submission of two opinion letters written by individuals representing the Honolulu Academy of the Arts and the Honolulu Japanese Chamber of Commerce. However, the letters do not discuss the beneficiary's duties in light of the relevant regulations, but rather state that the beneficiary is a successful businesswoman with expertise in fine arts of Japan, and that the petitioner is an asset to Hawaii's artistic community. Thus, while the AAO respects the opinions of these writers and the qualifications and achievements of the beneficiary, the letters have no evidentiary weight in this proceeding.

Finally, counsel noted that CIS approved other petitions that had been previously filed on behalf of beneficiary for the same position. It must be emphasized that each nonimmigrant petition filing is a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own merits. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Based on the lack of evidence of eligibility in the instant record of proceeding, the director was justified in departing from the prior approvals and denying this petition.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As stated above, the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the

beneficiary's duties have been and will be directly providing the services of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.