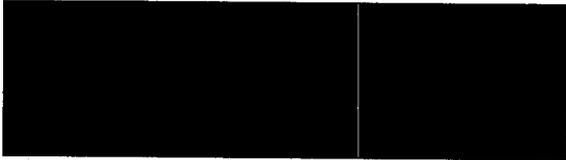




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
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File: SRC 04 099 50164 Office: TEXAS SERVICE CENTER Date: OCT 27 2005

IN RE: Petitioner:
Beneficiary:



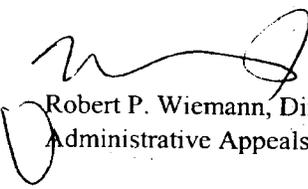
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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. 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 Pennsylvania corporation engaged in the production and distribution of agricultural products. The petitioner is an affiliate of [REDACTED] located in Porto Alegre, Brazil. The petitioner seeks to employ the beneficiary as its development manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary 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 asserts that the director incorrectly applied the law regarding "functional managers," and claims that the petitioner submitted sufficient evidence to establish the beneficiary's eligibility. Counsel submits a brief in support of the appeal.

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.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a managerial capacity. The petitioner does not claim that the beneficiary will be employed in an 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.

The petition was submitted on February 19, 2004. On the L Classification Supplement to Form I-129, the petitioner described the beneficiary's proposed duties as:

Direct and manage expansion plan into the Southeastern United States. Develop sales expansion goals and policies. As presence in the region grows, will take on responsibility for and supervision of sales team comprised of professional agronomic specialists.

In an appended letter dated February 13, 2004, the petitioner further described the beneficiary's proposed role as the company's development manager:

[W]e require the services of [the beneficiary] in the position of Development Manager to direct and manage an expansion plan into the Southeastern United States. In this regard, he will draw on his executive and managerial expertise in developing and managing sales expansion operations with our company's proprietary products in Brazil. It is essential that we continue to grow and increase our presence in this country. As such, our development

operations are critical to the success of our business in the United States. [The beneficiary] will play a key role in this progress and will operate at a senior level within our executive and management structure, serving as the most senior official responsible for development in the Southeastern United States and reporting directly to the Chairman of [REDACTED] of France. Specifically, he will develop policies and goals for expansion into the Southeast and will consult with senior executives to coordinate long-term planning for the department. He will also ensure the [REDACTED] methodologies and procedures are implemented appropriately in the United States. [The beneficiary] will have wide discretion in overseeing the implementation of the expansion plans. He will establish contacts in the United States, discuss partnerships and establish commercial relationships. Further, he will allocate the majority of his time to executive and managerial responsibilities. As the company's presence in the region grows, [the beneficiary] will take on responsibility for forming and managing a sales team comprised of agronomic specialists. At that time, he will have personnel authority over these employees, including responsibility for hiring, firing and other actions.

On March 1, 2004, the director issued a request for additional evidence, instructing the petitioner to provide copies of Quarterly Wage Reports for all employees from 2003, and an organizational chart for the U.S. company, specifying the beneficiary's position within the organizational hierarchy, as well as the names, job titles, and duties of the employees the beneficiary supervises.

In a response dated March 11, 2004, the petitioner, through counsel, provided the requested organizational chart depicting the beneficiary's proposed position as development manager overseeing a sales team of five to ten proposed employees. The petitioner's organizational chart also shows a sales department with a vice-president who reports to the chief executive officer, a manager, a sales manager, two territory managers, and fifteen sales personnel. However, the beneficiary and his proposed sales team are depicted as reporting directly to the chairman of Timac SA in France. The following statement from counsel accompanied the organizational chart:

We presume that you have requested this chart to clarify the beneficiary's prospective managerial position in the United States. Please note that the beneficiary qualifies as an L-1A functional manager since he will be serving as the most senior manager in the U.S. responsible for the critical function of developing the company's expansion into the Southeastern United States, reporting to the Chairman of the parent company in France Further, as the beneficiary expands the company's presence in the region, he will be responsible for hiring agronomic specialists to form the regional sales team, over which he will hold managerial responsibility.

The petitioner submitted a position description for an "agricultural group field representative" noting that the "agronomic specialists" hired by the beneficiary would perform the described duties. The petitioner also submitted the requested quarterly wage reports for 2003, which confirm employment of a total of 43 employees at the end of the year.

On March 26, 2004, the director denied the petition concluding that the petitioner did not submit sufficient evidence to establish that the beneficiary will serve in a managerial or executive capacity. The director noted that the beneficiary's subordinates had not yet been hired, and concluded: "The beneficiary will evidently exercise discretion over the day-to-day operations of the activity, but it must be noted that he will also perform much of the activity and will not supervise professional employees." The director observed that the petitioner has not demonstrated that the beneficiary's primary assignment will be directing the management of the organization nor that he will be primarily directing or supervising a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner contends that the director's decision contains numerous legal and factual errors, clear misstatements of the statutory and regulatory language, and misstatements of the facts involved in this case. Counsel again emphasizes that the beneficiary's proposed position is that of a functional manager with responsibility to "develop the policies, marketing directives and sales force for expanding the company's business in the Southeastern United States." Counsel contends that the director's decision addresses new issues that were not included in the director's request for evidence, specifically, that the petitioner had not established that the beneficiary will be a function manager or that he will not be performing sales or service tasks. Counsel argues that it was inappropriate for the director to deny the petition without first requesting additional evidence to clarify the beneficiary's job duties or the "functional managerial nature of the position."

Counsel further asserts that the director misstated the "functional manager" standard by requiring that the beneficiary have a subordinate staff, noting "the entire purpose of the functional manager category is to include managers who do not supervise other employees but who hold managerial responsibility over a critical component of the company." Counsel also disputes the director's conclusion that the beneficiary would be performing tasks to produce a product or provide services, observing that the director did not elaborate on his assertion or identify any job duties that would involve performing sales or service activities. Counsel argues that the director also inappropriately applied criteria for "executive capacity" and "supervisory managers" which are not relevant to this petition, as the beneficiary will serve as a function manager. Specifically, counsel notes that there is no requirement that the beneficiary be shown to "direct the management of the organization" or to "direct or supervise a subordinate staff of professional, managerial or supervisory personnel."

Finally, counsel refers to the petitioner's February 13, 2004 letter submitted in support of the petition and concludes:

In summary, this letter shows that the Beneficiary will be performing managerial duties in coordinating the establishment and development of the Southeastern expansion. In addition, the organizational chart . . . shows that the U.S. offices have sufficient personnel to provide any needed support for the Beneficiary while he establishes the corporate direction for this new business. Further, once the new business is operational, the company letter clarifies that the beneficiary will be responsible for hiring and managing a team of agronomic specialists to perform the sales and service tasks of the business.

Upon reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a managerial 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.* While the petitioner has consistently claimed that the beneficiary will serve in a managerial capacity, specifically as a "function manager," the petitioner's description of the beneficiary's duties is general. It is not possible to determine from the description provided whether the beneficiary's duties are primarily managerial duties or whether the beneficiary's duties will involve the routine daily tasks associated with sales and market research that are inherent in the beneficiary's responsibility for establishing a new sales territory for the petitioner. The position description provided does not sufficiently demonstrate that the beneficiary's tasks are the high-level responsibilities that are specified in the definition of managerial capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

For example, the petitioner states that the beneficiary will "develop policies and goals for expansion," "consult with senior executives to coordinate long-term planning," "ensure that Groupe Roullier systems, methodologies and procedures are implemented appropriately," and "have wide discretion in overseeing the implementation of expansion plans." The petitioner does not, however, define the beneficiary's policies, goals or plans, or identify what specific efforts the beneficiary will undertake to achieve these vague objectives. Furthermore, although counsel objects to the director's reference to the definition of "executive capacity" in her decision, the AAO notes that portions of the beneficiary's job description merely paraphrase the statutory definition of "executive capacity." See section 101(a)(44)(B), 8 U.S.C. § 1101(a)(44)(B). Paraphrasing the statutory definitions or reciting the beneficiary's vague job responsibilities and 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 will 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).

The petitioner indicated that the beneficiary will also "establish contacts in the United States, discuss partnerships and establish commercial relationships." Yet without additional explanation, these responsibilities suggest that some portion of the beneficiary's time will necessarily be devoted to non-qualifying duties related to researching the market and potential customers in the assigned region. Regardless, the petitioner did not sufficiently distinguish establishing "contacts," and "commercial relationships" from the sales duties to be performed by the beneficiary's proposed subordinates, nor did it indicate who would perform routine sales tasks in the region prior to the hiring of additional employees to staff the petitioner's new Florida location, if not the beneficiary. 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)).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive

duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of establishing that his duties are "primarily" managerial.

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner merely stated: "[H]e will allocate the majority of his time to executive and managerial responsibilities." This statement is not sufficient. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because as noted above, several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel repeatedly emphasizes that the beneficiary is clearly a functional manager and objects to the director's conclusion that the petitioner had not established that the beneficiary will supervise a staff of supervisory, managerial or professional employees. However, the director's analysis was appropriate given the petitioner's claim that the beneficiary was expected to hire and supervise a staff of five to ten "agronomic specialists" following the approval of the petition. 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. The petitioner has not established that the employees to be hired would possess or require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees would 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.

The AAO will next turn to counsel's primary argument that the beneficiary qualifies for L-1A classification as a "function manager." 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 detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes 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 has not provided a detailed job description nor submitted evidence to establish that the beneficiary will primarily manage the function of establishing a new sales territory.

The AAO acknowledges counsel's assertion that the director misstated the "functional manager" standard by requiring that the beneficiary have a subordinate staff, noting "the entire purpose of the functional manager category is to include managers who do not supervise other employees but who hold managerial responsibility over a critical component of the company." In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 (IMMACT 90) simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish management capacity. However, as in *Matter of Church Scientology*, the statutory requirement that a beneficiary "primarily" perform in a managerial or executive capacity continues to be a valid precedent. Moreover, federal courts continue to give deference to CIS's interpretation of IMMACT 90 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th Cir. 1995) (unpublished) (citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24; *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

As discussed above, the petitioner has provided a vague job description that fails to convey an understanding of the actual duties he will perform on a daily basis or the amount of time he will devote to managerial duties related to managing the assigned function. Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Counsel's claim on appeal that "the U.S. offices have sufficient personnel to provide any needed support for the Beneficiary while he establishes the corporate direction for this new business," is not supported by the record. The beneficiary will be working at an office located in Florida. The petitioner's quarterly tax returns show that all of its other employees are located in Pennsylvania, Wisconsin and New York, and the petitioner has not adequately explained how they will relieve the beneficiary from performing all the day-to-day operational duties associated with establishing a new sales office and territory in the Southeastern United States. Again, 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. at 165.

Further, when reviewing the totality of the record, the evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

The petitioner claims that the beneficiary would function essentially autonomously from the remainder of the U.S. company, reporting only to the chairman of a French parent company rather than to any higher level executives within the U.S. company, notwithstanding the petitioner's employment of a large sales organization that ultimately reports to the company's chief executive officer. Although the beneficiary is placed at a senior level on the petitioner's organizational chart, it is not clear how his role as "development manager" responsible for a sales territory and first-line supervision of a sales team would ultimately differ from that of a "territory manager," a position which is located significantly lower in the petitioner's organizational hierarchy.

The record does not establish that a majority of the beneficiary's duties will be primarily managing an essential function of the petitioning organization. The record indicates that a preponderance of the beneficiary's duties will, at least initially, be operational duties necessary to establish a new sales territory in his assigned region. 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). Although the petitioner claims that the beneficiary's department or territory will be staffed in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.