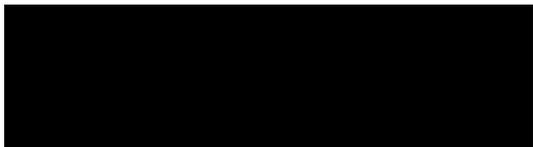


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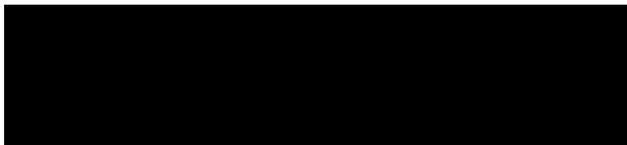
FILE: WAC 05 011 50417 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2006**

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, Chief
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 appeal will be dismissed.

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, a California corporation, claims to be the subsidiary of Modern Automatic Control System Co., Ltd. of Beijing, China. The petitioner claims to be engaged in international trade; namely, exporting industrial measurement and control equipment from the United States to China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and that contrary to the director's findings, the beneficiary was in fact employed in a primarily managerial or executive capacity. Counsel specifically alleges that the director did not consider all of the evidence submitted in support of the petition, and relied on minor discrepancies and factually incorrect statements in reaching its decision.

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)(14)(ii) provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

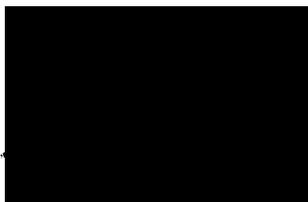
- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter from the petitioner dated September 7, 2004, the beneficiary's duties were described as follows:

The beneficiary has been working as President with the petitioner in L-1A status since February 2003. The petitioner intends to retain the beneficiary's service in the same position to perform the following duties:

1. She determines company's policies and establishes business goals. With the business nature in mind, she considers company's marketing capability, financial capability and human resource. She considers competitors' advantages and disadvantages of marketing and financial capabilities and human resource. She considers the social and economic environment here in the United States. Based upon all these, she determines and formulates company's policies: product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
2. She reviews marketing and financial reports to ensure that the company's objectives are achieved. She analyzes operation to evaluate company's performance and to determine areas of cost reduction and program improvement. She directs financial and budget activities to fund operations and increase efficiency. She demands the subordinates to submit their reports.
3. She makes decisions to adjust company's business orientation and operation. She decides to adjust product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
4. She reports to the parent company in China. She reports about the performance of the U.S. subsidiary and business opportunities here in the United States. She also receives information and instructions from the parent company in China.

Additionally, the petitioner provided an organizational chart for the U.S. entity, which demonstrated that the beneficiary oversaw the following employees:



Office Assistant
Branch Manager
Director of Technology Development
Marketing and Sales Manager
Business Development Manager

According to quarterly tax returns and payroll records for the quarter ending September 30, 2004, the Director of Technology Development, [REDACTED] was not paid any wages during this time period despite the petitioner's claim that his employment commenced on August 1, 2004. All other named employees were verified as active.

On October 21, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties and those of her co-workers, as well as a list of all subordinates of the

beneficiary, with a description of each person's position title, their duties, and their educational backgrounds. In addition, the director requested more information with regard to the beneficiary's claimed executive duties, with specific details about the discretionary decisions that she had exercised over the past six months.

In a response dated November 1, 2004, the petitioner, through its former counsel, responded to the director's request. Counsel stated that the petitioner currently employed four persons, including the beneficiary, at the San Diego office, and that it had since opened a second branch office in Houston, Texas, where an additional two persons were employed. Specifically, counsel stated that with regard to the beneficiary's work location, the following employees, in addition to the beneficiary, were present:



Office Assistant
Branch Manager
Director of Technology Development

The Houston office employed the following persons:



Marketing and Sales Manager
Business Development Manager

Counsel provided a statement claiming that all of these subordinate employees possessed advanced degrees.

With regard to the beneficiary's executive duties, counsel stated as follows:

[T]he beneficiary has performed the following duties since her arrival in the United States to work in L-1A status:

- She establishes the petitioner's long term policies and business goals by designing and implementing the petitioner's financial, administrative, personnel and marketing policies;
- She set up business departments and regulate[s] and delegate[s] administrative responsibilities to employees working in those departments; [s]he establishes and implements personnel policies in hiring and firing employees; [s]he also set up positions of technical consultants responsible for technical advises [sic] [;]
- She established the long-term business partnership with renowned manufacturers in the United States;
- She supervised technical managers of the company in selecting products and technologies for export to China; [she] is in charge of negotiations with suppliers regarding terms and conditions of purchasing such products and technologies[.]

The petitioner continued by explaining the basis for the petitioner's decision to continue in the export business, and provided the following description of specific day-to-day duties the beneficiary had performed in the past six months:

1. Conduct meetings with employees implementing the business tasks and goals;
2. Make decisions regarding hiring additional employees and set up compensation policies;
3. Meet with major customers and supervise negotiations with them; review and approve agreements and contracts;
4. Contact the parent company regarding the development of the business of the petitioner and make decisions on such matters as relating to future investment and personnel decisions
5. Have meetings with banks, accountants, lawyers to make decisions on financial and legal matters.

In short, the beneficiary's job duties will cover major decision makings [sic] process involving the term development of the petitioner; [s]he will not perform non-managerial duties, which are delegated to other employees working for the petitioner. It is self explanatory that the higher level executives, the board of directors, or stockholders of the organization require only general supervision of the beneficiary, considering the fact that the beneficiary is also the general manager of the parent company, as evidenced by the letter of employment submitted in the petition of the L-1 extension.

Finally, counsel asserted that due to difficulty obtaining her initial visa, the beneficiary only spent one month in the United States during her first period of L-1 status in 2003. As a result of the SARS epidemic in China, she was not permitted to return to the United States after departing during the validity period. Consequently, she was granted an additional one-year period in L-1 status from November 2003 to November 2004, and she arrived in the United States in January 2004. Counsel states that due to these unforeseen problems and delays in returning to the United States, the petitioner was unable to hire any employees prior to 2004.

On December 3, 2004, the director denied the petition. Specifically, the director concluded that in addition to failing to specify under which capacity, namely, managerial or executive, the beneficiary was seeking classification, the petitioner had failed to establish that the beneficiary satisfied the regulatory requirements of either one of these capacities. For instance, the director found that the beneficiary did not have a subordinate staff of professional, managerial, or supervisory employees to relieve her from performing non-qualifying duties.

On appeal, newly-retained counsel for the petitioner asserts that the beneficiary is in fact functioning in a primarily executive capacity by virtue of her position and level of responsibility. Counsel contends that the beneficiary's core job functions by definition constitute executive capacity, and that the director erroneously concluded that the beneficiary was performing non-qualifying tasks. Furthermore, counsel contends that the failure of Citizenship and Immigration Services (CIS) to approve the visa in this matter has caused the petitioner to violate a corporate statute of the state of California, which requires that a corporation maintain a president or chief executive officer throughout its existence.

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 matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Although counsel for the petitioner alleges, for the first time on appeal, that the beneficiary is employed in a primarily executive capacity, this election was not made prior to adjudication of the petition. Thus, the AAO must examine the beneficiary's qualifications under the criteria of both managerial and executive capacity for purposes of this appeal.

The initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of her duties, and paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific overview of the petitioner's organizational hierarchy and the beneficiary's position therein.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. For example, in response to the director's request for evidence regarding the executive capacity of the beneficiary, the petitioner submitted a response which started with the phrase "[a]s such, the beneficiary has been working as a manager for L-1A purposes." As stated above, a petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The updated description of duties, accompanied by the overly broad descriptions provided in the initial letter of support, fail to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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, *aff'd*, 905 F.2d 41. Although the petitioner provided a broad statement of the beneficiary's duties in the initial petition and again in response to the request for evidence, this description did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's managerial/executive duties, and failed to discuss or identify job-specific tasks or obligations the beneficiary is required to perform. Essentially, the petitioner equates managerial and executive capacity with the beneficiary's title of president, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or

regulations does not satisfy the petitioner's burden of proof. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The AAO notes that in response to the request for evidence, a section detailing the beneficiary's day-to-day duties was provided. Many of these duties, by definition, fall under the definition of managerial capacity, including decisions regarding the hiring of employees. The beneficiary claims to oversee a subordinate staff of professionals who relieve her from performing non-qualifying tasks. Upon further examination of the record, however, the AAO is not persuaded that this is actually the case. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

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 employee. In this case, the petitioner alleges that the beneficiary's subordinates are professional since they all possess advanced degrees. 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 purchasing and sales administration functions of the branch manager or the administrative functions of the office assistant, who are among the beneficiary's subordinates. Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. 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.

Furthermore, the branch manager and the office assistant are the only subordinates of the beneficiary considered when reviewing this issue, since they were the only employees working under her supervision in the San Diego office at the time of filing. Although the organizational chart lists Bing Xia, the director of technology development, as a third subordinate of the beneficiary, no payroll records were submitted to corroborate the claim that he was employed by the petitioner at the time of filing. In addition, while the beneficiary may have some indirect power over the two employees in the Houston office, there is no evidence in the record to demonstrate that these employees relieve her from performing non-qualifying duties, such as

meeting and negotiating with customers. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has failed to show that this is the case in this matter. Consequently, the petitioner has not shown that the beneficiary satisfies the criteria of managerial capacity.

Finally, counsel asserts that the denial of the petition is an infringement of Section 1502 of the California Corporation Code, which provides that a corporation must maintain a president or chief executive officer during its existence. Counsel asserts that the denial is essentially "usurping the power of the State to govern and regulate its own corporations." This assertion, and counsel's strenuous reliance thereon, is both illogical and unfounded. L-1A visas are designed for intra-company managerial and executive transferees to come and work in the United States, largely to facilitate the rotation of key personnel within multinational companies. The L visa classification is a nonimmigrant, temporary visa classification reserved for qualified managers, executives, or persons possessing specialized knowledge. The intention of the L visa classification is not to permanently satisfy staffing needs for U.S. entities, much less provide a permanent president or chief executive officer for the duration of the corporation's existence. The petitioning entity has been in existence since 2002, yet the beneficiary has only been in the United States under the title of president for a collective total of seven months since January of 2003. Counsel's reliance on this statute as a means to challenge the denial in this matter is completely misplaced and inappropriate.

Furthermore, it should be noted that the definitions of managerial and executive capacity, as set forth under sections 101(a)(44)(A)-(B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A)-(B), are not necessarily consistent with business industry standards or with the specific laws of any given state. In the event, however, that the California Corporation Code was relevant to a determination of managerial or executive capacity under the Act, the statute relied upon by counsel does not appear to require that the president or chief executive officer of a company actually reside in the United States. Nevertheless, it remains unexplained how this state statute necessitates the hiring of a foreign national as president or chief executive officer of the company, thereby requiring the granting of either an immigrant or nonimmigrant visa classification.

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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. Despite evidence indicating that an additional manager and cashier have been hired since the filing of the petition, 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).

For the reasons stated above, the petitioner has failed to establish that the beneficiary will be employed in a primarily 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, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.