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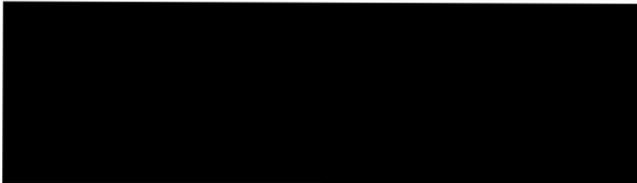
File: WAC 04 133 50184 Office: CALIFORNIA SERVICE CENTER Date: APR 03 2006

IN RE: Petitioner:  
Beneficiary:



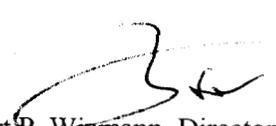
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, an interior automotive design manufacturer organized under the laws of the State of California, seeks to employ the beneficiary as its sales and support manager. The petitioner claims that it is the subsidiary of [REDACTED] located in Upplands Vasby, Sweden.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary had been employed abroad in a primarily managerial or executive position; and (2) the beneficiary would be employed in the United States in a primarily managerial or executive position.

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 misinterpreted the evidence that had been presented and contends that the beneficiary will have sufficient personnel underneath him in the United States entity to classify him in a managerial capacity. In support of this assertion, counsel submits a brief and 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(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.

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.

This first issue in this matter is whether the beneficiary had been employed abroad in a primarily managerial or executive capacity.

In the initial documents submitted, the petitioner provided a letter dated February 28, 2004 from its chairman of the board which discussed the beneficiary's duties abroad. Specifically, the petitioner stated:

In 1999, the parent company . . . appointed [the beneficiary] as Sales/Support manager in Sweden to head up a team entrusted with creating and developing a new computer-based sales support system for the company's products. In this capacity, [the beneficiary] was responsible for overseeing and coordinating the efforts of 2 employees to develop such program. The fruits of this massive effort was a program termed SESS. The purpose of this system was to simplify the company's Distributor's understanding of the complexity of the company's [sic] so the Distributors can offer total flexibility to the end user in choosing van interior configurations for every profession.

The petitioner further stated that

[The beneficiary] has since immersed himself in learning every aspect of the interior van design business. Specifically, from 1999 to present, [the beneficiary] has been employed as the Sales/Support Manager for [the foreign entity] in Sweden. As previously discussed, in this position, [the beneficiary] was responsible for the concept creation of SESS and the program's implementation with [the foreign entity's] international distributors.

On April 15, 2004, the director requested additional evidence establishing that the beneficiary had the requisite year of continuous employment abroad with the foreign entity, and further requested additional information with regard to the nature of the beneficiary's managerial and/or executive duties while employed abroad. Specifically, the director requested payroll records and personnel information, the total number of employees employed abroad, a more specific statement with regard to the beneficiary's duties while in that position, and a more definitive explanation regarding the reasons for his transfer to the United States.

In a response received on June 7, 2004, the petitioner submitted a statement addressing the director's request for further evidence regarding the beneficiary's position abroad. Specifically, the petitioner stated that the beneficiary oversaw two other employees who occupied the positions of sales support assistants. In addition, the petitioner provided the following breakdown of the beneficiary's duties:

The beneficiary's duties

5% Assist in calculations for quotes to customers within the SESS System

10% Educate new customers and dealers with the SESS program

15% Develop and update the SESS program with new products and also update new [configurations] for every new vehicle model and make introduced on the European/International market

5% Assist in [shows] nation wide and world wide [sic]. With focus on displaying the SESS – system for customers[,] etc.

15% Develop special "feature" leaflets from the SESS program for [s]pecific targeted sales-programs together with, for instance, [d]ealers, [a]utomotive [industry] or vehicle manufacturers.

5% As [manager fulfill] all duties against the two employe[es] working under him.

5% Together with the rest of the managers in the company make yearly budgets for the whole company, and follow up on results during the year.

10% Constantly working the next generation of SESS. Evaluate all information that [is] coming in to the company concerning the SESS program, for instance suggestion about new ways of operating the system, demands from end users in changing working methods and configuration [of] the SESS program.

10% Assist the sales team in their sales efforts towards [sic] "Fleet Customers." Creating special customized – versions of the SESS program.

10% Managing the back office and order[]registration for incoming orders.

**On June 10, 2004, the director denied the petition.** Specifically, the director noted that the beneficiary's primary duties appeared to involve specialized skills and experience in dealing with the SESS system, and did not include such qualifying duties as supervising subordinate managers or professionals or managing a function of the organization. The director concluded that the record contained insufficient evidence that the beneficiary's duties were primarily managerial or executive, and thus the petition was denied.

On appeal, counsel alleges that the beneficiary oversees a subordinate staff of professionals, thus qualifying him as a manager, while simultaneously claiming that the beneficiary manages an essential component of the organization abroad.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties abroad and the minimal information regarding his role in the business, it appears that the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive.

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). In this case, the petitioner listed each of the beneficiary's duties and claimed that the majority of his time abroad was spent developing and updating the SESS computer program. This primary task, coupled with the other identified duties such as assisting in shows nationwide and making yearly budgets, did little to define the exact nature of the beneficiary's obligations to the company.

On appeal, counsel disparages the director's decision and dismisses it as erroneous, specifically asserting that contrary to the director's decision, the beneficiary has in fact been functioning at a senior level within the

organizational hierarchy. Counsel contends that the two subordinate sales assistants relieve the beneficiary from performing non-qualifying duties and that the beneficiary answers only to the president of the organization. Furthermore, counsel contends that the petitioner has clearly satisfied its burden of showing that the beneficiary's position specifically conforms to the regulatory definitions and thus the beneficiary has been working abroad in a qualifying capacity. The AAO disagrees.

There are two problems with the beneficiary's stated duties. First, the beneficiary's duties abroad include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertions that the beneficiary is responsible for assisting with shows, managing the back office and ordering registration for incoming orders, and assisting in calculations for quotes to customers within the SESS system suggests that he is performing many undertakings that would normally be delegated to sales assistants or other non-managerial personnel. In this case, it is clear that the beneficiary's stated duties abroad include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate employee. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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).

In the alternative, counsel implies on appeal that the beneficiary is a function manager and that as a result, his duties in this respect are primarily managerial. 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. at 604.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Moreover, the petitioner repeatedly alleges that the beneficiary is in fact a qualified manager because he oversees a staff of professionals, yet simultaneously claims he is a function manager. This inconsistency is neither explained nor supported, as generally a function manager does not supervise or control the work of a subordinate staff. Counsel appears to be relying on multiple grounds for eligibility in this matter without regard for the discrepancies in the record.

The mere assertion that the beneficiary will be acting in a primarily managerial or executive capacity by virtue of his position title and position at the top of the organizational hierarchy, without more details

regarding the nature of his interaction with his subordinates and the exact nature of their positions, is insufficient to satisfy the petitioner's burden of proof in these proceedings. In this matter, it is clear that the beneficiary has intricate and unique knowledge of the petitioner's computer system known as SESS. The beneficiary's primary duties abroad revolve around the expansion of this system, and he was selected to go to the United States subsidiary to implement the SESS system. In this case, there is insufficient evidence to disprove the evidence in the record which indicates that the beneficiary is primarily responsible for the implementation, expansion, and maintenance of the SESS system. 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 Id.* This has not been established here.

For this reason, the petitioner may not be approved.

This second issue in this matter is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

In the initial petition, the petitioner provided a letter dated February 28, 2004 from its chairman of the board which discussed the beneficiary's proposed duties in the United States. Specifically, the petitioner stated:

As sales/support manager, [the beneficiary] will be responsible for overseeing all of [the petitioner's] North American Distributor's education, direction, and implementation of SESS. The specific duties are as follows:

- Daily review of accounts;
- Handling special circumstances and difficult cases;
- Further concept development and implementation of SESS program to enhance company products;
- Responsible for development and direction control of investment of company resources into SESS program in North America;
- Offer guidance and instill confidence for all our clients with company products;
- Keep abreast of International and United States marketing to enhance and to improve SESS to increase sales;
- Assisting clients[] product satisfaction, and deigning and implementing new products;
- Develop ongoing training classes as new concepts are developed and offered through the SESS program to the various managers and distributors in North America.

The position of Sales/Support Manager requires a minimum of three years work related experience in the development and management of the SESS program in the context of producer-distributor-end user context. The most important qualification of this position is the manager's familiarity with the SESS program to ensure effective communication with the

Distributors working underneath him or her in an effort to increase end user purchases and satisfaction.

The petitioner further stated that

[The beneficiary] has since immersed himself in learning every aspect of the interior van design business. Specifically, from 1999 to present, [the beneficiary] has been employed as the Sales/Support Manager for [the foreign entity] in Sweden. As previously discussed, in this position, [the beneficiary] was responsible for the concept creation of SESS and the program's implementation with [the foreign entity's] international distributors.

On April 15, 2004, the director requested additional evidence establishing that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director requested an organizational chart for the U.S. entity showing the beneficiary's position in the organizational hierarchy. In addition, the director requested details about all employees under the beneficiary's supervision, including their position titles, duties, and educational levels. Finally, wage verification and employment documentation was requested to verify the actual staffing levels at the U.S. entity.

In a response received on June 7, 2004, the petitioner submitted a statement addressing the director's request for further evidence regarding the beneficiary's position in the United States. The petitioner stated that the reason for the beneficiary's entering the United States was primarily "to implement and effectively utilize the SESS program to the U.S. market." More specifically, the petitioner stated:

As the company in [the] U.S. today [is] increasing [its] numbers [sic] of distributors constantly it is of increasing importance for the [company's] well being and development that the SESS program is introduced to the distributors and integrated [into] their daily work with the company and [its] product[s]. The SESS program has also to be adopted to the [specifics] of the North American market to meet the needs of the market. [The beneficiary] will also keep a close eye on needed new products for the U.S. market. Designing and implementing them. [sic] Last but not least, he will develop ongoing training classes as new concepts are developed and offered through the SESS program to the various managers, distributions [sic] and [their sales personnel] in North America.

The petitioner further stated:

A lower level manager or executive is not selected to this work because of the complexity of the SESS program, and an understanding [of] the program is needed, to be able to adopt it to the North American market. Remember that the program is a unique program developed for [the petitioner] and its product in this specialized market by [the beneficiary].

The petitioner also provided a list entitled "Job Duties for the beneficiary on an everyday basis," which stated as follows:

30% Educate new customers and dealers/distributors on the SESS program.

20% Assist in calculations for quotes to customers within the SESS program[.]

10% Develop special "feature" leaflets from the SESS program for specific targeted sales programs.

10% Assist the sales representatives in their sales effort towards "Fleet customers" creating special customized versions of the SESS program.

20% Update the SESS program for the North American market.

10% Managing the back office and order registration for incoming orders and shipping.

Finally, the petitioner stated that all work for the U.S. subsidiary to date had been done on a consulting basis, and therefore there had been no need for its own warehouse facilities or full-time employees. Therefore, the petitioner was unable to submit wage and employment verification documentation. The petitioner claimed that it would initially have independent sales representatives in its employ and would eventually hire 5-10 actual employees over the course of twelve to eighteen months.

On June 10, 2004, the director denied the petition. The director found that the record indicated that the beneficiary would be performing most of the tasks necessary to provide the petitioner's services, and thus concluded that the petitioner had not established that the beneficiary would assume a position that was primarily managerial or executive in the United States. On appeal, counsel for the petitioner alleges that due to changes in the petitioner's circumstances since the filing of the petition, the beneficiary's services were now essentially based on the rapid growth and unforeseen developments of the petitioner.

Upon review of counsel's arguments and the evidence contained in the record, the AAO concurs with the director's findings. In this matter, the petitioner proposed that the beneficiary enter the United States as an intracompany transferee to assume the position of sales support manager. The petitioner, however, failed to submit sufficient evidence to establish that the beneficiary would in fact be performing in such a capacity. The petitioner and counsel freely admit that at the time of the position's filing, the U.S. entity, though incorporated in 1995, had no full-time employees and no legitimate business premises. The petitioner further claimed that at the time of filing, the petitioner retained the services of independent contractors acting as sales associates, and that in twelve to eighteen months it would hire at least five full-time employees for the beneficiary to oversee.

This scenario is not conducive to supporting the beneficiary in a primarily managerial capacity. 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, although the petitioner states that the petitioner had contractual employees in the area of sales, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide.

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. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

The limited evidence and explanations provided prior to adjudication suggested that the beneficiary, whose main goal was to implement the SESS program in the United States entity, would be coming to the U.S. to produce the product or services of the U.S. entity. With no documentation corroborating the fact that independent sales associates existed, in addition to an admission that the petitioner had no employees or permanent warehouse facilities, the director correctly denied the petition. Upon review, the uncontradicted evidence contained in the record suggests that the beneficiary would be working independently to establish the SESS system in the United States, and would not be primarily engaged in managerial or executive duties. 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.

Furthermore, counsel now asserts on appeal that, due to changes beyond the beneficiary's control (specifically, the expansion of the U.S. operation and the terminal illness of a fellow employee), the beneficiary's executive services are absolutely essential and claims that the beneficiary would now be functioning as the petitioner's vice-president instead of the original position offered. Counsel proceeds on appeal to introduce a new position description for the beneficiary's duties as vice-president and relies on this new job title as proof that the beneficiary will be functioning in a primarily executive capacity in the United States.

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 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. at 249. 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).

In this matter, at the time of filing the U.S. operation had no employees. The petitioner failed to provide evidence that the beneficiary would nevertheless function in a primarily managerial or executive capacity. Instead of filing a new petition, the petitioner offers on appeal a more senior executive position to the beneficiary, and asserts that unforeseen circumstances warrant this change. Once again, insufficient evidence has been provided to establish the beneficiary's eligibility for the L classification at the time of filing. For this additional 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.