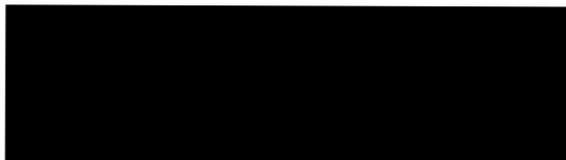


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FILE: WAC 03 214 55041 Office: CALIFORNIA SERVICE CENTER Date: APR 10 2006

IN RE: Petitioner:  
Beneficiary:



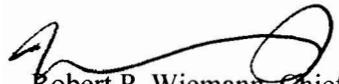
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner, LV Semicon, Inc., endeavors to classify the beneficiary as a manager or executive 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 claims to be a branch of [REDACTED] located in the Philippines and is engaged in the retail sale of mobile cellular phones and related products. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president. The petitioner was incorporated in the State of California in 2002 and claims to have three employees.

On October 22, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel submits a brief and explains the business plan of the company and accomplishments for the past ten months.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 issue in this proceeding is whether the beneficiary will be primarily performing executive or managerial duties for the United States entity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

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

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

The term “executive capacity” means an assignment within an organization in which the employee primarily-

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

In a June 20, 2003 letter submitted with the Form I-129, the petitioner described the beneficiary’s proposed U.S. duties as:

[T]o oversee new hires by him, and help the establishment and expansion of the company's operations within the United States. Without strong financial management, our company cannot continue to grow. [The beneficiary's experience and success as a [p]resident in [the foreign entity] make him the ideal person to help our business expand in the United States.

\* \* \*

[The beneficiary] will play a major role in all our company's long-term plans. [The beneficiary's] vital task is to penetrate the competitive market of the industry and establish our client base. Therefore, we strongly believe that [the beneficiary's] continued presence is essential to successfully achieve these efforts.

\* \* \*

[The beneficiary's] duties and responsibilities will include planning, developing, establishing and modifying new policies and objectives of . . . our Philippine parent company. Time to be spent: 20%

[the beneficiary's] specific responsibilities are to promote and develop business and the consumer field in the United States, facilitate the supply and demand factor of services, set corporate goals and policies, management of all financial, budget and personal operations. He will continue to oversee recruitment and training of personnel, consultation operations, budget allocation and control and contract negotiations with suppliers and clients. Our aim is to establish responsibilities and procedures to achieve smooth flow of operations. Time to be spent: 20%

[The beneficiary] will continue to plan and develop public relations policies designed to further improve our office's public image, as well as relations with the clients, employees, and the public. Time to be spent: 10%

[The beneficiary] will continue to direct and coordinate the formulation of procedures to increase efficiency of operations and to increase profits. He will review financial statements to determine progress and status in attaining profitability. He will revise objectives and plans accordance with current conditions. Time to be spent: 20%

[The beneficiary] will also continue to evaluate the work performance of the employees of our office. He will also look for compliance with established policies and objectives of our company and the contributions of the employees in attaining our objectives. Time to be spent: 15%

[The beneficiary] will ensure that the quality of service provided to clients of our U.S. office, . . . , is in strict adherence to the standards set by our Philippine parent corporation, . . . Time to be spent: 10%

Finally, the petitioner claimed that the beneficiary will spend 10 percent of his time “supervis[ing] all employees in different positions.” These subordinate employees included the following three employees: 1) a resource person in charge of sales and marketing and the promotion of products; 2) a person in charge of filing, invoicing collection and bookkeeping of transactions; and, 3) a person in charge of order tracking, import and export operations.

In a request for additional evidence, on July 29, 2003, the director requested a copy of the U.S. entity’s organizational chart clearly explaining the organizational hierarchy within the organization, a description of the beneficiary’s subordinates’ duties, educational credentials, wages, and immigration statuses, and evidence that the petitioner paid the independent contractors.

In response to the request for additional evidence, the petitioner submitted a September 6, 2003 letter, a copy of its U.S organizational chart showing the organizational hierarchy of the company and employee records. The petitioner did not provide a detailed description of the subordinates’ job duties.

On October 22, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director noted that the preponderance of the beneficiary’s duties will be directly providing the services of the business.

On appeal, the petitioner’s counsel submits a brief and explains the business plan of the company and accomplishments for the past ten months.

In 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). On review, the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The petitioner provided a broad description of the beneficiary’s duties that appears to indicate that the beneficiary will primarily perform the daily activities of the business. For example, the petitioner stated that the beneficiary’s specific duties will include “promot[ing] and develop[ing] business and the consumer field in the United States, facilitat[ing] the supply and demand factor of services, set[ting] corporate goals and policies, management of all financial, budget and personal operations.” However, it is unclear how the beneficiary will promote, develop, facilitate the business and set the corporate goals. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner described one of the beneficiary’s vital task as “penetrate[ing] the competitive market of the industry and establish our client base.” Since the beneficiary is actually involved in the development of the plans to increase the client base, thereby, increasing sales and revenues, he will be providing the services of the business rather than directing such activities. 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).

Moreover, although the petitioner claimed that the beneficiary will oversee a resource person in charge of the “sales and marketing and the promotion of products,” the AAO is not persuaded that this employee will perform the actual sales activities. The petitioner failed to provide a more detailed description of the

beneficiary's subordinates' duties as requested by the director. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason alone, considered as an independent basis for the decision, the petition must be denied.

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 claimed that the beneficiary will spend 10 percent of his time "supervise[ing] all employees in different positions." However, there is insufficient evidence to determine exactly what the beneficiary's claimed subordinates duties actually entail. As previously noted, the petitioner failed to provide a detailed description of the subordinate employees' duties that demonstrated how the beneficiary supervises his subordinates, despite the director's request for this evidence. Again, a failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 subordinate employee. 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 matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform bookkeeping duties or sales and marketing, whom are among the beneficiary's subordinates.

The AAO notes that the petitioner indicated on its U.S. organizational chart that one of the beneficiary's subordinates includes an independent contractor [REDACTED]. Although the petitioner claims to have a contractual employee, the petitioner submitted its 2002 U.S. Corporation Income Tax Return Form 1120 indicating that there was no cost of labor for these employees. Therefore, if the company, as it claims, uses an independent contractor it is not clear why the tax return does not reflect the cost of the labor for this company. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, the petitioner has not explained how the services of the contracted company obviate the need for the beneficiary to primarily conduct the petitioner's business.

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 petitioner stated that the beneficiary will continue “to direct and coordinate the formulation of procedures to increase efficiency of operations and to increase profits.” If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary’s daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As previously stated 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 593, 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

After careful consideration of the evidence, the AAO concludes that the petitioner has beneficiary has not established that the beneficiary will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act. As previously stated to establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary’s application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* The petitioner has submitted insufficient evidence to establish that the beneficiary’s employment abroad was of a qualifying nature. For instance, the beneficiary’s foreign duties are described as directly responsible for the management of the company. However, this description is vague and it is unclear what affairs of the company the beneficiary managed. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Finally, the AAO notes that although the petitioner claimed that the U.S. company was a branch of the foreign entity, in a June 20, 2003 letter submitted with the Form I-129, the petitioner claimed that it was also a subsidiary of the foreign entity. Since the petitioner submitted evidence to show that it was incorporated in the United States, then that entity will not qualify as “an . . . office of the same organization housed in a different location,” since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, the AAO must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. After examining the documents such as the amended articles of incorporation, bylaws, minutes of the meeting, and stock ownership and control, the AAO has determined that the petitioner submitted sufficient evidence to establish that it is a subsidiary of the foreign entity and, therefore, has a qualifying relationship with the foreign entity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.