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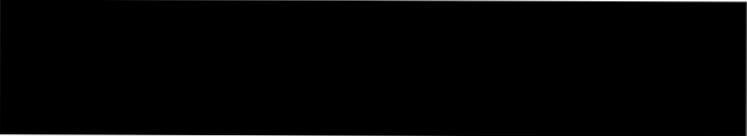


D-7

FILE: EAC 04 250 50779 Office: VERMONT SERVICE CENTER Date: **AUG 30 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, Vermont 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, [REDACTED], claims to be a branch office of Transportes Aereas de Cabo Verde ("TACV") located in Cape Verde. Petitioner claims that TACV is a publicly operated organization wholly-owned by the government of Cape Verde. The petitioner also claims that the parent company has a branch office in the United States located in Boston, Massachusetts. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's deputy general manager.

The director denied the petition based on the conclusion that that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

On appeal, counsel for the petitioner states that the petitioner will in fact be employed in a managerial capacity as he will manage an essential function of the United States entity and thus, will not function as a first-line supervisor. Counsel submits a brief and a statement from the petitioner in support of the appeal.

To establish 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 firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary 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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

The issue in this proceeding is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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.

On the Form I-129, the petitioner described the beneficiary's proposed United States duties as: "Assist in the management of all facets of the airline operations." In addition, in a supporting letter dated August 17, 2004, the petitioner further described the beneficiary's proposed U.S. duties as:

As Deputy U.S. General Manager, [the beneficiary] will be working with the five other employees of TACV stationed in the Boston branch. Although [the beneficiary] will not directly manage any subordinates, he will be the one of two senior level managers in the U.S. branch responsible for managing all facets of the airline's operation in the region. He will be part of a small team of individuals who oversee every aspect of the airline from sales to daily operation. In this capacity he will be responsible for preparing and managing the annual budget of TACV in this region. He will oversee sub-contractors and third party compliance to ensure that [sic] meet contract agreements. [The beneficiary] will have the authority to interview, hire, and fire employees. In addition, [the beneficiary] will be responsible for negotiations for partnership and multilateral agreements with other airlines.

As the Deputy U.S. General Manager, [the beneficiary] will act as a representative of TACV in this region. [The beneficiary] will be responsible for maintaining our organization's business relationship with client groups and agents. He will be one of two individuals who will act as liaisons to the U.S. Department of Transportation's Federal Aviation Administration and will participate in TACV's General manager's annual meetings with the Board of Directors of TACV. At these meetings [the beneficiary] will be needed to assist in the Board's assessment of the overall performance of TACV and [the beneficiary] will be acquainted with the new policies and objectives of the Board.

On September 14, 2004, the director requested additional evidence. Specifically, the director requested a comprehensive description of the beneficiary's proposed duties in the United States, indicating if the beneficiary's position will be managerial or executive in nature. The director also requested information regarding the subordinate employees, if any; an outline of time spent performing managerial duties and non-managerial duties; a description of the technical skills required to perform the duties in the United States; and the degree of discretionary authority in day-to-day operations the beneficiary will have. In addition, the director requested organizational charts for the United States branch and the foreign parent company.

In a response dated December 7, 2004, the petitioner submitted the requested information. Counsel for the petitioner stated: "The Deputy U.S. General Manager will function at a senior level with the organization as he will be responsible for supervising sales and marketing for the entire U.S. market of TACV." Counsel goes on to state the following:

In connection with his managerial and supervisory function, the Deputy U.S. General Manager is accountable for developing and implementing the nationwide U.S. sales and marketing plans of TACV. He will be responsible for proposing and putting into operation pricing strategies and fare levels. He will monitor sales promotion and advertisements of TACV's products throughout the U.S. and make executive decisions on matters related to sales, promotion, and marketing of TACV products in the U.S....

To monitor sales and implement the sales and marketing strategies he has developed, the Deputy U.S. General Manager will need to coordinate with general sales agents, travel agents and tour operators with which TACV has contracts, and in-house TACV sales and supervisors and employees inside and outside the U.S.

As a result, the Deputy U.S. General Manager will have executive and managerial authority over interviewing, hiring, and terminating the entire internal and external sales force of TACV. The Deputy U.S. General Manager will also be responsible for making executive decision on commissions, incentive and bonuses. Also in connection with his managerial and supervisory function for our organization's sales and marketing operations, the deputy U.S. general manager will be responsible for negotiating partnerships and multilateral agreements, insuring that agents meet these agreements, re-negotiating and in some cases terminative existing agreements where necessary.

In an attached statement, the petitioner provided job descriptions and requirements for its entire U.S. staff, including the following list of duties for the beneficiary:

- Report directly to the General Manager.
- Assist GM in the daily managing of the airline operation.
- Assist in the development of sales and marketing strategies for the U.S. and Canada territories.
- Set up sales and marketing goals; implement plans to attain objectives.
- Forecast sales, evaluate performance and perform market analysis.
- Prepare and manage budgets for sales and marketing activities.
- Appoint GSAs (General Sales Agent), Travel Agents, and Tour Operators throughout the territories.
- Develop and implement pricing strategies for market penetration.
- Identify new segments for market development.
- Perform operational dispatch, including load control, and Weight & Balance of B-757.
- Ensure timely dispatch of APIS, and AMS messages.
- Coordinate customer service operations to ensure on-time performance of flights.
- Liaise with the handling agent company, cargo, catering and other airport support services.
- Liaise with airport authority, US Customs & Border Protection (INS & U.S. Customs), USDA, and TSA.
- Assure airline's compliance with safety and security guidelines in force at the airport.
- Prepare airport statistical data.

The response submitted by the petitioner failed to indicate the amount of time the beneficiary will perform the managerial duties and the non-managerial duties. In addition, the petitioner submitted a very general organizational chart for the United States branch office. The chart did not specify the number of employees and their titles. Instead, the organizational chart indicated the general functions that the beneficiary would supervise, such as marketing, sales, promotion, merchandising, pricing, and internal and external sales.

The director denied the petition on December 22, 2004 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also suggested that the beneficiary will act as a first-line supervisor responsible for carrying out decisions made by his supervisor and corporate management. The director further stated that based upon the nature of the business, the description of the duties, and the organizational structure, it did not appear that the beneficiary would be employed in a primarily managerial capacity.

On appeal, counsel asserts that since the beneficiary was employed in a managerial capacity when working for the petitioner abroad, this fact thus suggests "the beneficiary is indeed an individual who would be expected to perform high-level sophisticated managerial duties." The petitioner's counsel further asserts that the job description submitted states that the beneficiary will not directly manage any subordinates, and will thus not be a first-line supervisor as suggested by the director. The petitioner's counsel asserts that the beneficiary will be "operating indirectly in exercising very substantial authority and discretion. It is neither accurate nor fair to characterize these responsibilities as those of a first-line supervisor." Counsel goes on to state that the beneficiary will be primarily employed in a managerial capacity by managing an essential function of the United States entity.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague and non-qualifying duties such as the beneficiary "will be responsible for negotiating partnerships and multilateral agreements," "identify new segments for market development," "liaise with the handling agent company, cargo, catering and other airport support services," and "prepare airport statistical data." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. According to the organizational chart submitted by the petitioner, it is not clear how many employees make up the sales and marketing department and which individuals, if any, will perform the marketing, promotion, merchandising, pricing and sales tasks that are necessary to produce or provide services. According to the record, it appears that the beneficiary will perform several non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. 593, 604 (Comm. 1988).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial in nature, and what proportion are actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In the response letter dated December 7, 2004, counsel stated "it is important to note that the position of deputy U.S. general manager qualifies as an L-1 managerial position based on its supervision of a function, sales and marketing for nationwide U.S. market." 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 in managing the essential function, 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). If a petitioner fails to document what proportion would be non-managerial, the AAO cannot determine 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). Therefore, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function.

As discussed above, the beneficiary's job description included non-qualifying duties associated with the petitioner's sales and marketing department, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to this function. The fact that the beneficiary has been given a managerial job title and some discretion over the day-to-day operations of the U.S. entity is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

The petitioner has not shown that the beneficiary will perform primarily managerial duties, nor has it been established that he would function at a senior level within an organizational hierarchy. Although the organizational chart submitted by the petitioner indicates that the beneficiary is second to the general manager, the chart also indicates that several departments are supervised by the general manager and are not supervised by the beneficiary and thus the beneficiary is secondary to these departments. Thus, the evidence is insufficient to establish that the beneficiary is a senior level manager for the petitioner. Accordingly, the petitioner has not established that the beneficiary will be employed primarily as a manager of an essential function.

Although counsel states on appeal that the petitioner utilizes contractual employees or "external" employees in the areas of sales and marketing who perform the tasks necessary to provide petitioner's services, however, the petitioner has neither presented evidence to document the existence of these employees nor identified the specific 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 perform non-qualifying duties associated with the petitioner's marketing function. 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily 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, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.