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**U.S. Citizenship
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File: WAC 04 107 50167 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 is a corporation organized in the State of California that is engaged in the import and wholesale distribution of agricultural and garden tools. The petitioner claims that it is the subsidiary [REDACTED] located in Rajkot, India. The beneficiary was initially granted L-1A classification for a one-year period in order to open a new office in the United States, and the petitioner now seeks to extend his stay.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director mischaracterized the nature of the beneficiary's duties, and claims that the petitioner submitted sufficient evidence to establish that the beneficiary performs only managerial and executive functions for the U.S. company. Counsel further asserts that the director placed undue emphasis on determining whether the beneficiary's subordinates are managers or professionals, while "ignoring" the duties performed by the beneficiary and failing to consider other relevant factors. Counsel submits a brief and copies of previously submitted evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also 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.

At issue in the present 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 March 2, 2004 letter submitted in support of the petition, the petitioner described the beneficiary's duties as follows:

He is fully responsible for directing the management of the corporation for establishing the goals, for contract negotiations, to hire and fire employees and for transaction of day-to-day business activities.

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As President of [the petitioner] the beneficiary will establish company policies and be responsible for overall management. He will oversee day to day operations, analyze financial reports, company's activity to maximize sales and profit, will establish long term goals and direct and supervise managerial staff.

The petitioner stated that it employed three individuals, including the beneficiary, as of the date of filing, and provided an organizational chart indicating that the beneficiary supervises a sales and marketing executive and a finance and purchase executive. The petitioner further indicated that the job duties of the sales and marketing executive include: selling products, taking orders from existing clients "from time to time," calling hardware distributors, sending catalogs and product samples, introducing new products into market, achieving sales targets, and holding responsibility for sales and marketing. The petitioner stated that its finance and purchase executive is responsible for: handling payments receivable and payable, managing banking activities, preparing invoices, releasing import documents, managing the overall financial activity of the company, placing orders to the parent company, tracking goods shipped from overseas, and overall responsibility for financial matters and purchasing of goods. Finally, the petitioner indicated that the beneficiary's duties are to manage and supervise activity of the employees of the company; to analyze

financial reports; to visit trade shows; to negotiate contracts; to decide plans and projects of the company and necessary actions to achieve them; and to hire and fire employees.

On April 28, 2004, the director requested, in part, a more detailed description of the beneficiary's duties in the United States. The director instructed the petitioner to be specific and to indicate the percentage of time the beneficiary allots to each of the listed job duties. The director also requested the job titles and job descriptions for all employees under the beneficiary's supervision.

In a response received on July 20, 2004, the petitioner indicated that the beneficiary is responsible for overall activity of the company, all management decisions related to the business, and provision of monthly financial updates to the Indian parent company. The petitioner indicated that the beneficiary devoted 20 percent of his time to marketing and promotion; 10 percent of his time to cost and profitability analysis; 10 percent of his time to target growth and future plans; 15 percent of his time coordinating with the petitioner's parent company; and 45 percent of his time to the direct supervision of employees.

The petitioner submitted a separate statement regarding the job duties of each of its employees, which included the following job description for the beneficiary:

His duty is to define plans and projections of the company. Giving instructions to [his subordinates] for achieving targets of the company. Reviewing sales and financial data from time to time and take necessary action to see that company's growth and profitability is achieved. To hire and fire employees of the company. To study USA market in depth and find out opportunities for growth and expansion of the company. To visit trade shows in USA, Mexico, South and Latin American countries. To study market and find out new products which can be developed at parent company in India. To coordinate with parent company and give them feed back of the market. Providing sales and financial updates to parent company. He is responsible for over all growth of the company in the USA.

The petitioner also provided the following updated job descriptions for the beneficiary's subordinates:

Marketing Executive – To sale [sic] products of the company in USA, Mexico, South and Latin American countries. Taking orders from existing clients from time to time. Call hardware distributors and convince them to buy our products, send them catalogue and samples of company. To introduce new products into the market. Achieve sales targets. Give report of sales and market feed back to the president from time to time. He is responsible for sales and marketing of the company.

Finance and Purchase Executive – Taking care of payments receivable and payable. Manage banking activities. To coordinate with CPA and to see that books of accounts are well maintained. Managing over all [financial] activity of the company and reporting to President. Place orders to Parent company. Keep track record of goods shipped from overseas. He is responsible for financial matters and purchasing of goods.

The petitioner submitted its California Forms DE-6, Quarterly Wage and Withholding Report, for the first two quarters of 2004, confirming the full-time employment of the beneficiary and his subordinates.

The director denied the petition on August 16, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the petitioner had indicated that the beneficiary would be employed in both a managerial and an executive capacity and thus must establish that the beneficiary's responsibilities meet the requirements of each capacity. The director further noted that the beneficiary would be performing non-qualifying marketing duties, and that the petitioner's description of the beneficiary's duties in general was too broad to establish what duties he would actually perform on a day-to-day basis, such that he could be classified as a manager or executive. The director also found insufficient evidence to establish that the beneficiary would supervise and control the work of supervisory, professional or managerial employees, concluding that the beneficiary's two subordinates are "clearly employed in non-professional positions."

On appeal, counsel for the petitioner asserts that the beneficiary devotes 55 percent of his time to the "executive" duties of marketing and promotion, analysis of cost and profitability, target growth and future planning, and coordinating business with the petitioner's parent company; and 45 percent of his time to the "managerial" function of directly supervising his subordinates. Counsel further states that the beneficiary performs the high-level responsibilities included in the statutory definitions of managerial and executive capacity. Counsel contends that the director made a "subjective determination" based on the petitioner's organizational chart. Specifically, counsel claims that the director ignored and discounted the managerial and executive duties performed by the beneficiary "in its quest to determine that the 'managed' employees are supervisors or managerial employees themselves." Counsel asserts that the determination as to whether the beneficiary is employed in a managerial or executive capacity must be based on many factors, not merely the supervision and control of supervisory, professional and managerial employees.

Counsel's assertions are not persuasive. 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 the instant matter, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. See 8 C.F.R. § 214.2(l)(3)(ii).

As noted by the director, the petitioner initially provided a vague and nonspecific description of the beneficiary's duties that failed to demonstrate what managerial or executive functions the beneficiary performs on a day-to-day basis. For example, the petitioner initially stated that the beneficiary's duties included responsibility for "contract negotiations," "transaction of day to day activities," and "analyz[ing] financial reports." Without further explanation, these duties do not appear to fall under the statutory

definitions of managerial or executive capacity. The remainder of the beneficiary's job description merely paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner indicated that the beneficiary would be "directing the management of the corporation," "establish[ing] company policy," and "establishing the 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).

When requested to provide a more detailed account of the beneficiary's specific duties and the percentage of time he devotes to each duty, the petitioner provided an even more abbreviated job description that, again, appears to include non-qualifying duties. For example, the petitioner indicated that the beneficiary would devote 20 percent of his time to "marketing and promotion" and 15 percent of his time to "coordinating with parent company." The petitioner did not, however, indicate any specific managerial or executive tasks associated with these functions. Rather, the petitioner indicated that the beneficiary would be performing an in depth study of the U.S. market, visiting trade shows, and providing marketing and sales feedback to the foreign entity. Without further explanation, these duties, which account for 35 percent of the beneficiary's time, depict an employee who is directly involved in the company's day-to-day market research and routine internal reporting 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).

As properly noted by the director, the petitioner's descriptions of the beneficiary's duties included non-qualifying duties and were too vague and general to allow any meaningful determination as to what actual duties the beneficiary performs, or how much time he devotes to qualifying managerial or executive functions. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What 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 at 1108.

On appeal, the petitioner again declines to further delineate the beneficiary's actual tasks. Instead, counsel again paraphrases the statutory definitions of managerial and executive capacity, asserts that the beneficiary meets the criteria of both definitions, and states that petitioner provided "factual proof" of the duties performed by the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As discussed above, the record contains no comprehensive description of the beneficiary's duties and no supporting evidence to support the petitioner's claim that the beneficiary is employed in a managerial and executive capacity, other than in position title. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel also contends that the director placed undue emphasis on determining whether the beneficiary would supervise professional, managerial or supervisory employees, noting that the director is required to base his decision on the beneficiary's actual job duties. Counsel's argument is not persuasive. Preliminarily, the AAO notes that the director did not base his decision solely on a determination that the beneficiary would not supervise professional, managerial or supervisory employees. Rather, the director properly reviewed the petitioner's description of the beneficiary's duties and found it to be insufficient to establish the beneficiary's employment in a primarily managerial or executive capacity for the reasons discussed above.

Further, in response to the director's request for evidence, the petitioner specifically stated that the beneficiary devotes 45 percent of his time to supervising his two subordinates, and counsel asserts on appeal that this responsibility falls under the statutory definition of managerial capacity. In light of these assertions, the director's analysis regarding the employment capacity of the beneficiary's subordinates was necessary to a determination as to whether the beneficiary is employed in managerial capacity. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties are managerial because they 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. Although the petitioner refers to the beneficiary's subordinates as "executives," the petitioner has not shown that either of these employees supervises subordinate staff members or manages a clearly defined function within the petitioning company.

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. 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 either of the beneficiary's subordinates possess a bachelor's degree, or more importantly, that a bachelor's degree is actually necessary, for example, to perform the sales work of its "marketing executive," or the bookkeeping, purchasing and administrative duties performed by its "finance and purchase executive." The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary would allocate 45 percent of his time to the non-qualifying task of supervising non-professional employees.

Counsel further asserts that the director "subjectively determined based on the organizational chart. . .that the beneficiary will not be primarily employed in a qualifying managerial or executive capacity" and goes on to emphasize the success achieved by the company under the beneficiary's leadership during the first year of operations. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take

into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, 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 first-line supervisory tasks, the petitioner is ineligible by regulation for an extension.

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 show 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. Hence, the fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. While the AAO does not doubt the beneficiary's responsibility for the petitioner's long-term planning and performance, the record is not persuasive in demonstrating that the beneficiary's actual duties will be in a primarily managerial or executive capacity. In the instant matter, the petitioner has failed to show, as of the date this petition was filed, that non-qualifying marketing and first-line supervisory duties will not constitute the majority of the beneficiary's time.

The petitioner has indicated its intention to hire a total of nine employees within four to seven years. However, 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). As noted above, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. 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.

ORDER: The appeal is dismissed.