

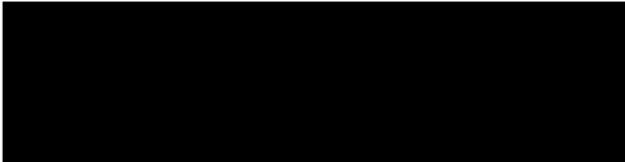


U.S. Citizenship
and Immigration
Services

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File: WAC 04 171 50295 Office: CALIFORNIA SERVICE CENTER Date: JUN 02 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a corporation organized in the State of California that is engaged in the wholesale of giftware and home decoration items, including Christmas decorations, employs the beneficiary as its president. The petitioner claims that it is the subsidiary of [REDACTED] located in Guangdong, China.

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

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner claims that it has established that the beneficiary has been functioning as an executive, and further claims that the director's erroneous characterization of the beneficiary's duties and the petitioner's organization resulted in an incorrect decision by the director.

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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

In the initial petition, the petitioner submitted a letter dated May 19, 2003 in which it discussed the beneficiary's qualifications for the U.S. position. The petitioner also stated that it was doing business under the fictitious name [REDACTED] and that it had a net loss of \$93,967 for the year 2003. On the L Supplement to the Form I-129, the petitioner described the beneficiary's duties as follows:

[The beneficiary is] [i]n charge of all overall management of the company. [He] [e]xercises wide latitude in discretionary decision making. [He] [d]irects the implementation of the business expansion plan and operation policies. [He] [d]irects the utilization of financial reports and activity data to determine the strategy and progress of the company's business and designate further business goals and plans. [He] [m]eets with local business leaders to build up the network for the company. [He] [o]verses management strategies and promotion activities, and approve[s] the management improvement. [He] [h]as the authority to hire, terminate, evaluate and promote the managerial personnel based on their job performance, qualification and contributions.

Additionally, in the letter of support dated May 19, 2003, counsel stated:

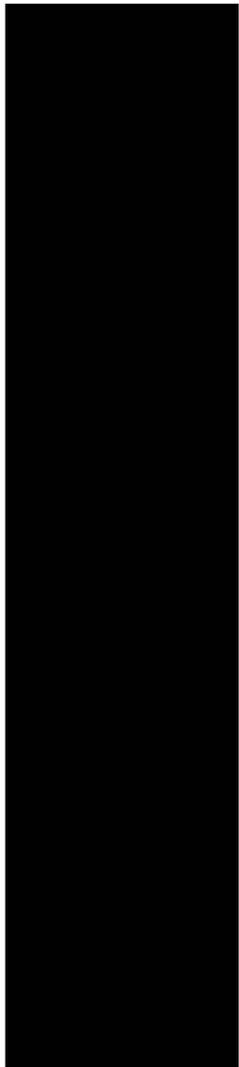
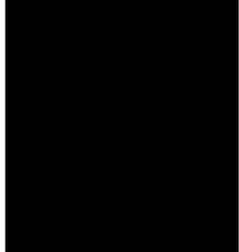
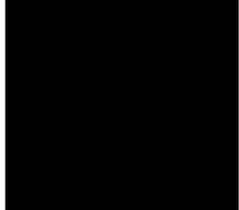
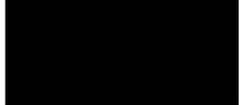
[The beneficiary] works as a president for [the] U.S. company. He performs the executive duties of [the] company's import, export & international trade. He also establishes goals and policies of the company. He spends all or substantially all of his time in these executive duties.

Due to his experience with the development and management of the parent company and U.S. subsidiary, the continuation of his service as the president of the U.S. subsidiary is needed for the next three years. At present, there is no single individual in the subsidiary who can assume a leadership position to continue the success achieved in the past.

The director found the initial description of duties insufficient, and consequently issued a request for additional evidence on July 13, 2004. The request specifically asked the petitioner to submit an organizational chart outlining the organizational hierarchy of the entity, with the names, position titles, position descriptions, educational levels and salaries of all employees. The director also requested more

evidence establishing the executive capacity of the beneficiary, including the specific goals and policies and the specific discretionary decisions made by the beneficiary within the past six months, in addition to the beneficiary's day-to-day duties.

In a response dated July 30, 2004, the petitioner provided the following list of employees, in order of their rank in the organizational hierarchy:

Name	Job Titles/Duties	Education	Salary
Beneficiary	President: General administration	High School	\$2,000/month
	Executive Secretary/ Treasurer: Execute all policies initiated by the President. Responsible for all financial chores in U.S. operation, taxation, auditing, and budgeting.	B.A.	\$1,500/month
	Sales/Human Resources: In charge of all phases of sales operations, custom duties, sales, and customer services. Be responsible for all hiring processes, employee benefits, and profit sharing.	B.S.	\$1,500/month
	General Affairs: Be responsible for all in-house office management, purchasing office equipment, contracting, and shipping duties.	High School	\$1,212.40/month
	Technology Development: In charge of all in-house computer operations, search information through computer, and warehouse management.	B.S.	\$1,212.40/month

With regard to the director's specific questions pertaining to the beneficiary's duties for the past six months, counsel stated:

Over the last six months, [the beneficiary] has established company framework including expense and reporting policies. He has also established product development procedures such as establishing information collection policy for store visit, catalog collection, and internet, as well as established product development approach for tread identification, color coding, and sample making for products such as Patriotic Santa. In addition, [the beneficiary] established sales strategies including building website, booth in trade shows such as Las Vegas ASD/ADM show and Canton Fair, developing short-term strategy to contact distributors and wholesalers such as Imperial Distributors and ICM, and developing long-term strategy to contact retailers. For example, [the beneficiary] [] successfully got Wal-Mart Canada and ABC Distributing as U.S. subsidiary's customers. He also made contact with over 20 retailers including K-Mart, Rite Aid and Walgreens. Moreover, he was responsible for making discretionary decisions on the rounds of customers to approach, products to be presented to customers, and final product prices and discount offers. His day-to-day duties now and over the last six months include approval of expenses, analyzing reports on company financial activities, confirming purchase orders, approval on terminating, hiring, and promoting employees, approval of U.S. subsidiary's policies and strategies, directing business expansion plan, and dealing with customers of senior levels.

The petitioner also submitted copies of its employees' W-2 forms for 2003.

On July 30, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner would not reach the point where it could employ the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations since it appeared that the beneficiary would merely be involved in many customer service related duties.

On appeal, counsel for the petitioner restates the beneficiary's qualifications as an executive and specifically lists the beneficiary's primary duties and discusses each in detail. Counsel further asserts that the director's conclusions about the beneficiary's role in the petitioner and the infancy of its organization led to the erroneous conclusion that the beneficiary was not acting primarily as a manager or executive.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See sections 101(a)(44)(A) and (B) of the Act.* In this case, the petitioner asserts that the beneficiary is a qualified executive by virtue of his position title of president, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. 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).

The description of the beneficiary's proposed duties, provided with the initial petition and again in response to the director's request for evidence, is vague and seems to merely paraphrase the regulatory definitions. For example, on the organizational list of employees and their duties, the beneficiary's position is summed up as merely "general administration." In the more specific statement of the beneficiary's daily duties for the past six months, duties such as "approval of expenses," "confirming purchase orders," and "dealing with customers of senior levels" identify tasks that do not exclusively fall under the definitions of managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time will be devoted to the operation of the business. For example, the response to the request for evidence indicates that the beneficiary has been establishing sales strategies and executing contracts with various retailers and distributors. The petitioner further discusses the beneficiary's role in the building of its website and his attendance at trade shows. These tasks are clearly essential to the operation and expansion of the petitioner's business, and are not qualifying duties under the definition of executive or managerial capacity, as the petitioner contends. 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).

It is evident, therefore, that the beneficiary has been and will be performing duties that would normally be delegated to subordinate employees in order to keep the business operational. The petitioner states that there is no other person in the organization qualified to handle the beneficiary's position. Since, as stated above, the position requires many functional tasks directly associated with the introduction of the petitioner's products into the U.S. market, it cannot be concluded that the beneficiary will be operating in a qualifying capacity, because by the petitioner's own admission, the duties of the position are exclusive to the beneficiary.

Counsel for the petitioner claims on appeal that the beneficiary's duties are in fact primarily executive, and counsel individually addresses several of the beneficiary's stated duties and explains the manner in which they are qualifying tasks. For example, counsel states that approval of expenses is done by the petitioner's executive secretary and not the beneficiary. This claim is directly contrary to the statement in the July 30, 2004 letter where it is claimed that this is one of the beneficiary's exclusive duties. With regard to "confirming purchase orders," counsel asserts that the beneficiary insists on signing them personally, but that the actual confirmation of orders is handled by the sales staff, in addition to the general purchasing. Again, there was no indication of the assistance of the sales staff when the statement of the beneficiary's duties was provided in response to the director's request. Finally, with regard to the establishment of the company website and trade show booths, counsel claims that these results were accomplished by the sales and technical staffs, and were developed by the general manager. Counsel continues to remove the beneficiary from the performance of these day-to-day activities, alleging that the director's finding in the matter was erroneous.

There are two problems with counsel's assertions on appeal. First, these assertions directly contradict the previous statement of the beneficiary's duties for the previous six months, and raise the question of counsel's motive in offering a new level of responsibility to the beneficiary on appeal. 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. 248, 249 (Reg. Comm. 1978). 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).

Second, the petitioner's stance with regard to the continued need for the beneficiary's services is that only he is qualified to perform the duties described in detail prior to adjudication. To now assert on appeal that the beneficiary merely directs the staff, and does not perform these crucial and specialized duties previously deemed exclusive only to him raises questions with regard to the validity of the petitioner's claims. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Although the petitioner alleges that the beneficiary is qualified for the visa extension based on his executive employment, Citizenship and Immigration Services (CIS) also affords review under the definition of managerial capacity to increase the beneficiary's chance of meeting the regulatory requirements. In this matter, however, the director concluded that the beneficiary was not acting in a managerial capacity based on his failure to supervise a staff of subordinate managers or professionals. 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.

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. While the petitioner provided the level of education attained by each of its employees, and the AAO notes that executive secretary holds a Bachelor of Arts Degree and the sales/human resources and technology development employees hold Bachelors of Science, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact,

established that a bachelor's degree is actually necessary, for example, to perform the duties of the sales/human resources employee, who is among the beneficiary's subordinates.

Thus, the petitioner has not established that these employees require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Finally, counsel asserts that the director's reliance on the infancy of the petitioner and its lack of staff to relieve the beneficiary from performing non-qualifying duties is an erroneous basis for the denial. 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 administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature, or that the petitioner is able to support the beneficiary in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.