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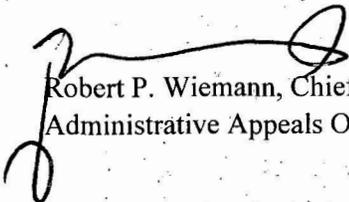
IN RE: Petitioner:  
Beneficiary:

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, 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 employ 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 is a Nevada limited liability company that claims to be engaged in investment activities and import and export of tobacco leaves and cigarettes. The petitioner states that it is a subsidiary of \_\_\_\_\_ located in Hong Kong, China. The petitioner seeks to employ the beneficiary as its president for a three-year period.

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 "ignored the facts of the case" and "commonsense business practice," and failed to correctly consider the reasonable needs of the petitioner given its overall purpose and stage of development. Counsel submits a brief 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.

At issue in the present matter is whether the petitioner established that 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.

The nonimmigrant petition was filed on February 23, 2005. The petitioner noted on Form I-129 that the company has two permanent employees and ten "occasional employees" and seeks to employ the beneficiary

as its president, and as vice president of its majority-owned subsidiary, [REDACTED]. In a letter dated February 18, 2005, the petitioner described the beneficiary's proposed role as follows:

We require [the beneficiary's] frequent presence in the United States as an executive and manager employed by both [the petitioner] and [REDACTED] in order to delegate or personally attend to all activities required to important duties in our operations. He will handle, delegate or personally conducted [sic] all activities necessary to establish [the petitioner's] investment activities as well as Southwest Bull's purchasing tobacco, producing and exporting cigarettes to a higher profitable level. Specifically Board of Directors of [the foreign entity] has authorized [the beneficiary] to complete discretionary powers over day-to-day operations, payroll and banking duties, execution of asset and property leases, hiring and firing of employees, setting-up budgets to establish the project and other duties as is necessary.

The petitioner also submitted minutes of a January 18, 2005 meeting of the Board of Directors of the its claimed parent company, which included the following description of the beneficiary's proposed duties in the United States:

- a. To establish the business goals, commercial tactics, company policies and business budgets of [the petitioner] and Southwest Bull & John, Inc.;
- b. To strengthen the commercial relationships with the tobacco importers and exporters companies in China and to procure the export of tobacco leaves from USA to China as soon as possible;
- c. To obtain the ATF Manufacturing license in the USA, to join in the Master Settlement Agreement and to start manufacturing the U.S. brand name "America No. 1" as soon as possible;
- d. To expand the investment and trading businesses of [the petitioner];
- e. To manage the day-to-day operations of the company, to utilize the company's capital and assets with full authority, to hire and fire staff (including secretary, accountant, translator, lawyers, sales person and worker) with full authority[.]

On March 7, 2005, the director issued a request for additional evidence, in part instructing the petitioner to submit the following evidence in support of its claim that the beneficiary would be employed by the petitioner in a managerial or executive capacity: (1) a more detailed description of the beneficiary's proposed duties in the United States including the percentage of time to be spent in each of the listed duties; (2) an organizational chart for the U.S. entity which clearly identifies all subordinates to be supervised by the beneficiary by name and job title; (3) a brief description of job duties, educational level, annual salaries/wages, and immigration status for all employees under the beneficiary's supervision; and (4) copies of Nevada quarterly wage reports for all employees for the last four quarters.

In a response received on May 26, 2005, the petitioner provided the following information in response to the director's request for a detailed description of the beneficiary's duties:

[The beneficiary] will primarily have the following duties:

- a. manages the [petitioner] and its subsidiary Southwest Bull & John, Inc.;
- b. Supervises and controls the work of officers of two companies and general operation [of] two companies;
- c. Exercises discretion over the day-to-day operations of the activity[.]

In lieu of the organizational chart requested by the director, the petitioner provided the following description of its current staffing levels:

Right now [the petitioner] hired Qing Yang, a U.S. citizen as secretary and treasurer with salary of \$2,200/month. Southwest Bull hired Thomas F. O'Neil, a U.S. citizen, as President/CEO and vice president of [the petitioner]. For [the petitioner's] Jani-King project, we hired about 10 part time workers who are legally authorized to work. Mr. O'Neil made a mistake in investing \$72,000 into Jani-King's project, his compensation will be decided by [the beneficiary] once he is here in the United States.

The director denied the petition on June 8, 2005, concluding that the petitioner had failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director found that the job descriptions provided for the beneficiary were overly broad and merely paraphrased portions of the statutory definitions for managerial and executive capacity. The director further observed that the duties described appeared to include sales and marketing tasks which could not be considered managerial or executive in nature. In addition, the director noted that the petitioner failed to provide the requested position descriptions for the beneficiary's claimed subordinates and therefore had not established that the beneficiary would supervise a staff of professional, managerial or supervisory employees, or that the subordinate staff would relieve the beneficiary from performing the non-managerial and non-executive functions of the company. Finally, the director noted that the petitioner did not submit documentary evidence to support its claim that it had hired ten part-time workers or any other staff, such as contractors or consultants, to relieve the beneficiary from performing the day-to-day duties required to operate the business.

The director acknowledged that the petitioner may intend to increase its full-time staff in the future, but noted that the future hiring of additional employees has no bearing on a determination as to whether the beneficiary will be employed in a primarily managerial or executive capacity. The director observed that the petitioner, as an established office, must establish eligibility for the beneficiary sought at the time of filing.

The petitioner filed the instant appeal on July 7, 2005. In an appellate brief dated August 2, 2005, counsel for the petitioner asserts that the beneficiary's duties will be primarily executive in nature, and contends that the director "ignored not only the facts of the case but also commonsense business practice." Specifically, counsel states:

The Service neglected to take into account the fact that the Beneficiary, as the President of [the petitioner] and Vice-President of Southwest Bull of the company, is in essence the only employee who can be considered a company executive. If the Service's position is to be taken to its logical end then it must be concluded that the Petitioner is a company lacking

executives and managers and instead is a company that consists of only lower level employees. From a business standpoint this is impossible.

Counsel emphasizes that the foreign entity invested over one million dollars in the U.S. operations, and asserts "all companies must have executive level employees who are vested with the powers to oversee the operation of the business. The Petitioner has vested such overall executive powers in the Beneficiary and to conclude otherwise is to ignore not only the facts of the case but commonsense business practice." Counsel recites the statutory definition of "executive capacity" and asserts that the beneficiary's duties as described by the petitioner, are "virtually identical." Counsel suggests that the director's conclusion that the beneficiary would act as a first-line supervisor over non-professional employees implies a failure on the part of the director to review the documentation submitted.

Counsel further asserts that the director failed to consider the reasonable needs of the petitioning organization in light of its overall purpose and stage of development, as specified in section 101(a)(44)(C) of the Act. Counsel states that many small business operated streamlined organizations and states that USCIS "should not judge the sophistication and complexity of executive positions in the relevant industry on the basis of the number of employees supervised, or the lack of subordinate employees." Counsel cites an unpublished AAO decision in support of his assertion that "staffing levels should only be considered if the Petitioner relies upon them as the primary basis upon which to qualify a beneficiary as an executive or manager." Counsel states that "the staffing of three U.S. employees are perfect" for the petitioner's current stage of development, and notes that the petitioner will "immediately take bold steps to expand" upon approval of the beneficiary's L-1A visa petition.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed by the U.S. entity in a primarily 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.*

While the petitioner has been provided with multiple opportunities to provide a detailed description of the beneficiary's proposed duties, the provided job descriptions do not address the specific managerial or executive job duties to be performed by the beneficiary in the position of president. For instance, in its February 18, 2005 letter, the petitioner stated that the beneficiary will "delegate or personally attend to all activities required to important duties in our operations," "handle, delegate or personally [conduct] all activities necessary" related to the petitioner's investment and tobacco purchasing and exporting businesses, and have "complete discretionary powers over day-to-day operations." The petitioner's description does not clarify what specific "activities" are "necessary" and it clearly acknowledges that the beneficiary will directly "perform," "handle," or "personally conduct" certain activities, thus implying that he will be performing certain non-managerial or non-executive tasks, rather than supervising the performance of such tasks through subordinate personnel. 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).

Similarly, the position description submitted by the foreign entity, included in its January 18, 2005 board meeting minutes, describes the beneficiary's position in ambiguous terms, and lacks the specificity required by the regulations. *See* 8 C.F.R. § 214.2(l)(3)(ii). Specifically, the meeting minutes include such vague duties as "establish the business goals, commercial tactics, company policies and business budgets," "expand the investment and trading businesses," and "manage the day-to-day operations of the company." The petitioner did not define the beneficiary's goals or policies, identify the specific efforts to be taken to "expand" the business, nor explain what tasks the beneficiary would perform to "manage the day-to-day operations." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The foreign entity's board meeting minutes also indicate that the beneficiary's responsibilities will include obtaining licenses to "start manufacturing" in the U.S. and "to strengthen the commercial relationship with the tobacco importers and export companies in China and to procure the export of tobacco leaves from USA to China." The petitioner's failure to address the specific managerial and executive tasks involved in these responsibilities is particularly relevant as these more closely resemble non-qualifying tasks related to the organization's marketing, sales, purchasing and export functions. Based on the petitioner's claims, the beneficiary would "oversee" all operations, yet, as noted above, the petitioner did not identify which tasks the beneficiary will perform personally, and which tasks will be delegated, nor did it sufficiently describe its staffing structure or provide evidence that the beneficiary would be relieved from performing non-qualifying duties associated with the day-to-day operations of the petitioner's two businesses.

In sum, the petitioner's initial job descriptions were overly broad and suggested that the beneficiary would be required to devote some portion of his time to non-qualifying duties related to the purchase, sales and marketing of the petitioner's products. Accordingly, the director reasonably requested a detailed description of the specific duties to be performed by the beneficiary in the proposed position, an account of the percentage of time the beneficiary would devote to each of the listed duties, an organizational chart for the company, descriptions of all positions to be supervised by the beneficiary, and evidence of wages paid to the petitioner's employees. 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 requested evidence was critical, as it would have assisted in establishing whether the actual duties to be performed by the beneficiary are managerial or executive in nature, the percentage of time to be devoted to qualifying versus non-qualifying duties, and whether the petitioner employed other workers who would reasonably be expected to relieve the beneficiary from primarily conducting the day-to-day functions of the business.

The petitioner failed to provide most of the requested evidence, including the organizational chart, a description of the duties to be performed by the beneficiary's subordinates, a detailed list of the beneficiary's duties, or the percentage of time he would devote to each of his various responsibilities. 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).

Instead, the petitioner submitted an even more general job description of the beneficiary's proposed duties which essentially paraphrased the statutory definition of managerial capacity, noting that the beneficiary would "manage" the petitioning company and its subsidiary, supervise and control the work of the companies' officers, and "exercise discretion over the day-to-day operations of the activity." See sections 101(a)(44)(A)(i), (ii) and (iv) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The AAO will not accept a vague job description and speculate as to the managerial or executive tasks to be performed in connection with overseeing "daily operations" or unspecified "activities." The petitioner has not established the actual duties to be performed by the beneficiary as president, such that they could be classified as managerial or executive. On appeal, counsel simply repeats the position description found in the petitioner's February 18, 2005 letter and asserts that as the description closely resembles the statutory definition of "executive capacity," the beneficiary is qualified for the benefit sought. Counsel also argues that the beneficiary "is the only employee who can be considered a company executive" and implies that the denial of the petition leads to the conclusion that the company can operate without an executive.

Counsel's assertions are not persuasive. The petitioner's initial description of the beneficiary's duties, as discussed above, was overly broad and failed to distinguish between executive and non-executive tasks. Again, the petitioner cannot satisfy its burden of proof by paraphrasing the statutory definitions. The regulations require a detailed description of the actual duties to be performed by the beneficiary. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Further, counsel's assertions that every company requires an executive and that the beneficiary is the only employee who can be considered an executive of the petitioning company is not supported by the record. The petitioner indicates that the beneficiary will serve as president of the petitioning company and as vice president of the petitioner's subsidiary, [REDACTED]. The petitioner has also stated that [REDACTED] serves as president of the petitioner's subsidiary and as vice president of the petitioner. Since the petitioner has provided no description of Mr. [REDACTED] duties and only a limited description of the beneficiary's duties, the AAO has no basis for distinguishing between these two employees in terms of the level of authority held by each.

Regardless, the fact that the beneficiary has an executive job title and 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)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or

"executive." See section 101(a)(44)(A)(iv) of the Act; see also 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799). An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

With regard to the petitioner's employees, counsel correctly observes that, when staffing levels are used as a determining factor in denying a visa to a multinational manager or executive, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In addition, it is important for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petitioner claims to operate two companies, the petitioning company and its subsidiary, and states that it employs a full-time vice president (who serves as president of the subsidiary), a full-time "secretary and treasurer," and "ten part time workers who are legally authorized to work." The petitioner's quarterly wage report for the first quarter of 2005 confirms the employment of the vice president and two part-time workers who received wages of approximately \$250 and \$770. The petitioner's "secretary and treasurer" was not on the petitioner's payroll at the time the petition was filed, although it appears that this employee was issued a Form W-2 by the subsidiary company in previous years. There is insufficient evidence to establish that this employee was working for either company as of the date the petition was filed. Although specifically requested by the director, the petitioner opted not to provide a detailed organizational chart depicting all of the beneficiary's subordinates and their job titles, or position descriptions for its employees. 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)).

The petitioner claims to operate a cleaning franchise business, and is seeking "other investments," and its subsidiary is engaged in the import, export and wholesale trade of cigarettes and tobacco. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company and its subsidiary might plausibly be met by the services of the beneficiary as president and vice president, a vice president and president, a secretary and treasurer, and two part-time employees. Rather, a review of the totality of the record, including the submitted job descriptions and evidence of staffing, supports the director's conclusion that the beneficiary would be required to devote the majority of his time to performing non-managerial, non-executive duties related to the petitioner's and its subsidiary's sales, marketing and other

routine operational tasks. An employee who “primarily” performs the tasks necessary to produce a product or to provide services 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 Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary’s position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The AAO acknowledges that in certain situations a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner’s obligation to establish however, through independent documentary evidence, that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary. Again, as the petitioner has failed to provide job descriptions for its employees or a clear description of the petitioner's and its subsidiary's organizational structure, the petitioner has not met this burden. Even though the enterprise claims to be in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirement of establishing that the beneficiary will perform primarily managerial or executive duties as of the date the petition is approved.

The AAO acknowledges the petitioner's assertions that the U.S. company and its subsidiary anticipated hiring additional employees and expanding their business operations in the future. However, as noted by the director, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed primarily in a qualifying 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.

**ORDER:** The appeal is dismissed.