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FILE: LIN 02 119 52599 Office: NEBRASKA SERVICE CENTER Date: **OCT 17 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)

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, Nebraska 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 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 limited liability company organized under the laws of the State of Delaware and is engaged in the business of manufacturing, sales and distribution of production systems. The petitioner claims that it is the subsidiary of [REDACTED] located in Spain. The beneficiary was initially granted a nine-month period of stay to open a new office in the United States and the petitioner's subsequent request to extend the beneficiary's L-1A status was denied (LIN 02 035 55248). The petitioner now seeks to employ the beneficiary in the position of general manager for a three-year period.

The director denied the petition concluding that there is insufficient evidence to demonstrate: (1) that the beneficiary will serve in a primarily managerial or executive capacity in the United States; and (2) that the petitioner is doing business in the United States as required by the regulations.

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 beneficiary will in fact hold an executive position in the United States and that the petitioner is doing business. In support of this assertion, the petitioner submits additional evidence.

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 first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity by the U.S. entity.

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

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

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

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

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

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

The nonimmigrant petition was filed on February 25, 2002. The Form I-129 indicates that the beneficiary will be employed in the position of General Manager. In a letter of support dated February 18, 2002, the beneficiary's proposed duties in the United States are described as the following:

[The beneficiary] will return to occupy the important position of General Manager of [the petitioner's] office, located in Bensenville, Illinois. The position is a key managerial and executive one within [the petitioner's group], because it is key to developing and expanding FAGOR in the U.S. and the Americas. The General Manager will also have all important managerial and executive responsibilities for the office in Illinois.

As General Manager of North American operations, [the beneficiary] will be responsible for establishing the goals and policies concerning [the petitioner's] sales, service facilities, budget determination, and human resources, in the Automotive and Home Appliances sectors. [The beneficiary] will also oversee the goals and policies of the proposed new U.S. Division in the Steel sector. The proposed Vice-President of the new U.S. Steel Division will report directly to [the beneficiary]. The planned new U.S. Steel Division is evidence of continued growth and expansion of [the petitioner], which [the beneficiary] grew from 0 to 9 employees in less than one year. The company is attempting to implement the organization's long-scheduled objectives, particularly objectives concerning Steel Mills and Steel Service, considering to eventually culminate in an investments in a U.S. steel company. . . . [the foreign entity] is planning to implement the company's "Plan to Purchase a Steel Company" in the U.S. This plan was authored by [REDACTED] proposed Vice President of [the petitioner's] new U.S. Steel Division, who will report to the beneficiary as General Manager of North America Operations.... In that regard, the Beneficiary will oversee, direct and manage the proposed acquisition of a U.S. steel company, via purchase or merger, and will have [REDACTED] the proposed Vice President of [the petitioner's] new U.S. Steel Division, report to him directly.

The General Manager also has responsibility for firing and hiring of personnel and will analyze and formulate corporate policy in the U.S. corporation.

In addition, the petitioner submitted an organizational chart for the U.S. entity. The chart indicates the beneficiary as general manager who supervises the proposed position of Vice President for Steel Division and supervises the sales managers, stamping equipment, the sales manager, steel division, the sales manager, special equipment, one assembly technical and one after sales services. The sales manager for the steel division supervises one secretary.

On March 8, 2002, the director requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. The director noted that the "description of the beneficiary's duties is vague and general and does not provide specifics of his day-to-day duties and how they are to be carried out." Specifically, the director requested that the petitioner submit evidence to establish that the beneficiary qualifies under all four criteria stated for either a manager or executive, such as a statement signed by an authorized officer of the prospective employer describing the alien's intended employment in the U.S. The statement should include information concerning the dates of

employment; job titles; specific job duties; types of employees supervised, if any; level of authority; and title and level of authority of the alien's immediate supervisor. In addition, the director requested copies of the company's IRS Form 941, Employer's Quarterly Federal Tax Return, for each quarter of 2001 and the first quarter of 2002 with supplemental sheets showing employees' names, hours worked, earnings and social security numbers, and a description of the duties of the employees employed at the U.S. entity.

In its response dated May 8, 2002, the petitioner submitted an affidavit from the Chief Executive Officer of the parent company abroad and the president of the U.S. entity. In the affidavit, the petitioner describes the duties to be performed by the beneficiary in the U.S. as the following:

7. Currently, [the petitioner] seeks to hire [the beneficiary] for the position of General Manager of North America Operations. The position of General Manager is a key executive position within [the petitioner's group] since it is at the heart of developing and expanding [the petitioner] in the U.S. and the Americas. As General Manager, [the beneficiary] would report directly to the CEO of [the foreign entity].

*The affidavit further repeats the duties described in the original job description.*

In a letter dated May 8, 2002, counsel for the petitioner submits the following duties to be performed by the beneficiary in the United States:

In addition to the detailed description of the General Manager's duties contained in Mr. Azpiazu's (the CEO of Fagor-Spain) Affidavit, [the beneficiary] will also be responsible for planning, developing, and establishing the policies and objectives of [the petitioner], in accordance with the directives of the [the petitioner's] Board of Director's and the corporation's charter. In effect, as General Manager, [the beneficiary] will be the "CEO" for [the petitioner]. The General Manager will be responsible for conferring with FAGOR officials to plan business objectives between [the petitioner] and [the foreign entity]. [The beneficiary] will also review activity reports and financial statements to determine progress and status in attaining commercial objectives. The Transferee will direct and coordinate the formulation of financial programs to provide funding for the continued growth and development of [the petitioner], with the goal of maximizing returns on investments, and increasing productivity. In his capacity as General Manager, [the beneficiary] will plan and develop various industrial, labor, and public relations policies designed to improve [the petitioner's] image and relations with customers, employees, and the public.

In addition, the petitioner submitted the requested IRS Form 941, Employer's Quarterly Federal Tax Return, for 2001 and the first quarter of 2002. The petitioner also submitted a table detailing the current employees of the U.S. entity, including their job duties, positions, job titles, level of education, and hiring and firing authority. The petitioner's Illinois Form UI-3/40, Employer's Contribution and Wage Report, for the first quarter of 2002 confirmed the employment of employees identified as "after sales services; sales manager, stamping equipment; sales manager; special equipment; sales manager, steel division; secretary, and assembly technical."

In the director's decision dated May 21, 2002, the director stated "regarding the beneficiary's role in establishing goals and policies, the evidence does not demonstrate that there exists individuals who carry out the follow-up work of implementing and overseeing the carrying out of these policies and goals. It appears the beneficiary performs the duties, which are not considered to be executive in nature." In addition, the director noted that it appears that the beneficiary will be a first-line supervisor. Consequently, the director denied the petition.

On appeal, counsel for the petitioner states that the petitioner submitted "voluminous evidence in support of [the beneficiary's] executive capacity transfer to the position of General Manager at FAGOR-US." Counsel for the petitioner further explains how the position offered to the beneficiary is executive in nature and is not a first-line supervisor position. Specifically, counsel for the petitioner states the following:

The evidence submitted by the Petitioner in support of [the beneficiary's] proposed transfer to [the petitioner] clearly establishes that [the beneficiary] will act as the General Manager or "CEO" of [the petitioner]. The evidence submitted by the Petitioner established that [the petitioner] currently employs three (3) Sales Managers, two technicians and one secretary. Thus, both managerial level employees (such as the Sales Managers) and lower level employees within [the petitioner] would implement the policies and goals established by [the beneficiary]. Thus, [the beneficiary] can in no way be considered a "first-line supervisor", as noted in the Decision. In addition, as the General Manager of [the petitioner], "[the beneficiary] will be responsible for supervising and controlling all current and future employees of [REDACTED]...In addition, the General Manager also has the authority to first and hire any [the petitioner] [sic] employee."...Since the evidence clearly established the existence of both managerial and non-managerial level employees at [the petitioner], it is against the manifest weight of evidence to hold that [the beneficiary] acts like a first-line supervisor in his capacity as General Manager of [the petitioner]. In contrast, "the position of General Manager is a key executive position within the [the petitioner's group] since it is at the heart of developing and expanding [the petitioner] in the U.S. and the Americas."

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 duties such as the beneficiary will be "responsible for establishing the goals and policies concerning [the petitioner's]

sales, service facilities, budget determination, and human resources,” “oversee the goals and policies of the proposed new U.S. Division in the Steel sector,” and “responsible for conferring with [the petitioner's] officials to plan business objectives and to develop operational policies for the coordination of functions and operations between [the petitioner] and [the foreign entity].” 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The description also includes several non-qualifying duties such as the beneficiary will "direct and coordinate the formulation of financial programs to provide funding for the continued growth and development of [the petitioner], with the goal of maximizing returns on investments, and increasing productivity,” and “analyze marketing potential of new and existing products and determine our marketing strategies and goals.” Without further explanation, these duties suggest that the beneficiary would be directly involved in the company's finance functions, marketing, sales and promotion activities rather than supervising others who perform non-managerial duties related to these functions. 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).

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States. The petitioner did not submit the requested job description as requested by the director. Instead, the petitioner reiterated the job duties described in the original job description. 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. For this reason alone, the appeal will be dismissed.

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 petitioner's description of the beneficiary's position provides no information regarding his day-to-day duties, such that they could be classified as managerial in nature. The AAO will not accept an overly broad and ambiguous job description and speculate as to the related duties.

In addition, the support letter submitted by the petitioner dated February 18, 2002 indicates that an important aspect of the beneficiary's responsibilities include "oversee, direct and manage the proposed acquisition of a U.S. steel company, via purchase or merger, and will have [redacted] the proposed Vice President of [redacted] s new U.S. Steel Division, report to him directly." However, the petitioner did not submit evidence that the [redacted] successfully obtained a visa to enter the United States and fill the position of Vice President for the petitioner. U.S. Citizenship and Immigration Services (USCIS) records show that the

petitioner filed two I-129 petitions on behalf of [REDACTED], in November 2001 and February 2002, both of which were denied. Since it is unclear if the company has employed or will employ a vice president in order to commence the process of acquiring the new Steel Division, several of the beneficiary's responsibilities may be merely speculative. 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).

The record shows that as of the date of filing, the petitioner asserts that the beneficiary will control and direct subordinate managerial staff. The U.S. entity employed three sales managers, one after sales services employee, one assembly technician supervisor and one secretary. 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 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 a bachelor's degree is actually necessary, for example, to perform the administrative, technical support work and sales functions of the employees of the U.S. entity, who will be among the beneficiary's subordinates. Nor has the petitioner shown that any of its "sales managers" actually 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.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. 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. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general

supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Although the United States company has employed three sales managers, an after sales services employee, an assembly technician supervisor and a secretary, it appears that the beneficiary is performing the market research, financial development, and several operational tasks inherent in operating a company on a daily basis, such as acquiring new business, acquiring products, maintaining inventory, paying bills, handling export and import of products, negotiating contracts, and human resources functions. 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). Based on the foregoing discussion, there is insufficient evidence to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue to be addressed in this proceeding is whether the petitioner has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

*Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The regulation at 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 establish the new office. Furthermore, at the time the petitioner

seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

The director in the decision stated the following:

[T]he petitioner claims the U.S. entity has had revenue of nearly one million dollars. However, in reviewing the invoices of the amount reported as revenue by the petitioner it is noted that all but a little more than \$24,000 was received from the foreign entity in 2001...Therefore, the documentation does not demonstrate that the U.S. entity is more than a mere presence for the foreign entity.

On appeal, counsel for the petitioner states that "the relatively larger volume of trade between [the foreign entity] and [the petitioner] reflects the pattern of trade that is not unique to this organization." Counsel for the petitioner also states that since the U.S. entity is establishing itself in the U.S., it relies on many of the operational capabilities of the foreign company. In addition, counsel for the petitioner asserts that as the U.S. entity further establishes its operations in the United States, it will need to rely less on the trade and sales with the foreign parent company.

Upon review of the documents submitted on appeal, the petitioner has established that the United States entity is doing business.

In addition, the director erred in basing his decision on the fact that the majority of the revenue derives from the parent company. The regulations do not limit a corporation from doing business with its parent company. Therefore, the fact that a petitioner is engaged in business transactions with a related foreign entity should not be the determinative factor in deciding whether the company is doing business. A representative office is not specifically excluded by the definition of "doing business," provided that it shows that it is engaged in the provision of goods and services, albeit on behalf of a related foreign entity. Therefore, the petitioner has established that it is doing business as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H).

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.