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FILE: WAC 05 033 50547 Office: CALIFORNIA SERVICE CENTER Date: **OCT 19 2006**

IN RE: Petitioner:
Beneficiary:



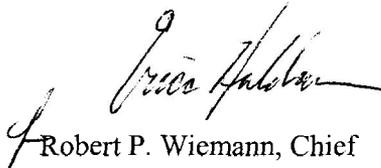
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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, a California corporation, claims to be in the transportation business. The petitioner states that it is an affiliate of "M N Trucking" Sociedad de Responsabilidad Limitada de Capital Variable located in Mexico. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act for two years. The beneficiary was initially granted a one-year period of stay and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner states that the beneficiary is employed in a managerial and executive capacity as demonstrated in the detailed job description previously submitted. In addition, counsel for the petitioner asserts that a "professional" staff is not required for a company in the trucking industry similar in size to the U.S. entity. Instead, counsel contends the staff is sufficient to carry out the day-to-day activities of the company relieving the beneficiary from primarily performing non-qualifying duties. Counsel for the petitioner urges AAO to consider the nature of the business and staffing levels required for a company in the trucking industry. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

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

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

The 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.

The 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.

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 November 17, 2004. In a support letter dated November 8, 2004, the petitioner described the beneficiary's proposed duties in the U.S. as the following:

[The beneficiary's] duties as President of [the petitioner] will continue to include developing and establishing overall business policies and objectives of the company; and coordinating functions and operations of the company. He will continue to oversee the day-to-day operation of the business, as well as planning and developing public relations policies aimed at establishing and improving the company's image with corporate partners. He will continue to evaluate the performance of company personnel, as well as monitor overall employee performance.

As the key executive in the U.S., [the beneficiary] will continue to consult with legal advisors and accounting personnel in order to assure company compliance with federal, state, and local laws, including tax and licensing regulations. He will also be responsible for reviewing consolidated balance sheets, monthly financial and production reports, and year-end financial statements.

On January 3, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit additional evidence in support of its petition. Specifically, the director requested: the organizational chart of the U.S. entity, including a description of the job duties, educational level, and the annual salaries for all employees under the beneficiary's supervision; the Employer's Quarterly Federal Tax Return, Form 941, for the last four quarters; copies of the U.S. company's payroll summary, Forms W-2 and W-3, for all employees for 2003; and, copies of the U.S. company's California Employment Development Department Form DE-6, Quarterly Wage Reports, for the last four quarters. In addition, the director requested additional information regarding the claimed executive capacity

of the beneficiary including: a list of the specific goals and policies the beneficiary has established over the last six months; a list of the specific discretionary decisions that the beneficiary has exercised over the last six months; evidence that the higher level executives, the board of directors, or stockholders of the organization require only general supervision of the beneficiary; and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In response to the director's request regarding information of the duties that the beneficiary will perform, the petitioner submitted a detailed job description for the position of president. The petitioner also submitted an organizational chart of the U.S. company and a brief job description for the manager position only. The petitioner did not submit the job description for the other three employees listed on the organizational chart and did not indicate the educational level and annual salary of the employees. 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 organizational chart for the U.S. company indicates that the beneficiary will supervise the manager, the logistic employee and two drivers. The organizational chart also indicates several proposed positions that were not filled at the time the petition was filed. The petitioner states in its response that "the manufacturing industry, that industry which our company provides transportation services for, is undergoing a slump now as the economy has been slowed." The petitioner further asserts, "as our footing becomes firmer, the company will need to hire more U.S. workers."

As discussed, the petitioner also submitted a detailed job description for the duties that will be performed by the beneficiary. The duties are as follows:

As President of our Company, [the beneficiary] will continue to supervise and manage business development (e.g., marketing of our services and negotiations with all U.S. business partners) and overseeing all business functions in the U.S. [The beneficiary] will continue to aggressively establish and develop the U.S. company and its network of U.S. business relationship. He will extensively engaged [sic] in the company Business Development and Marketing functions, including managing and overseeing all business expansion and organizational aspects of the company (40% of the time). He will continue to be in charge of establishing operational and service contract commitments with U.S. customers, developing the company's image through advertising/marketing, and developing/managing the company budget, finance/accounting, advertising, and personnel functions (30% of time). [The beneficiary] will continue to be responsible for supervision of U.S. market research, facilities development, meeting clients, and approving/signing all contracts. His overall mission is to create an efficient business infrastructure in the U.S. which is capable of supporting our North American business. [The beneficiary] continue [sic] to be tasked with ensuring that the company's services are delivered quickly and efficiently as possible in the context of an extremely competitive market (30% of time).

[The beneficiary] will continue to negotiate and execute contracts, network within the U.S. manufacturing sector, attend trade shows and seminars, and visit U.S. companies. He will continue to be given the responsibility to develop the company's business activities with its U.S. customers. To put it simply, [the beneficiary] will continue to temporarily remain in

the U.S. because his specialized and extensive management knowledge in the cross-border transportation industry, and his experience is necessary for the company to establish solid network of customers in the U.S.

In addition, in its response, the petitioner submitted a brief job description for the manager of the U.S. organization. It appears that the manager is responsible for the managerial accounting duties, customer service duties, and marketing duties. As mentioned above, the petitioner did not explain the duties of the logistics employee or the drivers.

The director denied the petition on May 18, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also noted that the evidence does not support a finding that the petitioner will be supervising a subordinate staff of professionals, or managers. In addition, the director noted that the several of the duties of the beneficiary were non-qualifying and did not establish the beneficiary is primarily engaged in executive duties.

On appeal, counsel for the petitioner asserts that the petitioner submitted a detailed job description for the position of president which establishes that the beneficiary will be primarily engaged in executive duties. In addition, counsel for the petitioner asserts that professional employees are not common in the trucking industry and thus urges the AAO to review the staffing levels and educational requirements for this particular type of business.

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

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

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as responsibility for "developing and establishing overall business policies and objectives of the company," "coordinating functions and operations of the company," overseeing "the day-to-day operation of the business, as well as planning and developing public relations policies aimed at establishing and improving the company's image with corporate partners" and engaging in "the company Business Development and Marketing functions, including managing and overseeing all business expansion and organizational aspects of the company." The petitioner does not explain how the beneficiary will perform these requirements or clarify what exactly are the goals

and policies of the petitioner. 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)).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will "supervise and manage business development (e.g., marketing of our services and negotiations with all U.S. business partners) and overseeing all business functions in the U.S.," "responsible for supervision of U.S. market research, facilities development, meeting clients, and approving/signing all contracts" and "negotiate and execute contracts, network within the U.S. manufacturing sector, attend trade shows and seminars, and visit U.S. companies." It appears that the beneficiary will be directly responsible for performing the sales and marketing duties of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. 593, 604 (Comm. 1988).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will spend on various duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicates that the beneficiary will spend 40 percent of his time to engage "in the company Business Development and Marketing functions, including managing and overseeing all business expansion and organizational aspects of the company." The record does not resolve whether the beneficiary will perform the day-to-day tasks to develop and implement the marketing programs and policies, or whether he will direct others to do so. The petitioner indicated a vague description of the duties performed by the manager who is supervised by the beneficiary, however, the duties of the manager include only 20 percent of her time in managing marketing operations for the U.S. company. The lack of employees for the beneficiary to direct and coordinate raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner's marketing duties.

The petitioner further states that the beneficiary will spend 30 percent of his time to "establishing operational and service contract commitments with U.S. customers, developing the company's image through advertising/marketing, and developing/managing the company budget, finance/accounting, advertising, and personnel functions." It does not appear that the U.S. company has hired a finance employee to prepare the budget and manage financial growth, thus, the petitioner is preparing the financial documents rather than reviewing the work prepared by a subordinate employee. In addition, without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. These duties have not been shown to be managerial or executive in nature. 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)).

In addition, the petitioner states that the beneficiary will spend 30 percent of his time to “ensuring that the company’s services are delivered quickly and efficiently as possible in the context of an extremely competitive market.” According to the organizational chart, the company consists of the president, manager, logistics employee and two drivers. It is unclear what duties are performed by the logistics employee. Based on the record of proceeding, the beneficiary's job duties are vague and principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees.

Finally, the petitioner states that the beneficiary will “negotiate and execute contracts, network within the U.S. manufacturing sector, attend trade shows and seminars, and visit U.S. companies.” Meeting with clients and negotiating contracts are not qualifying duties because they are not managerial or executive in nature. Instead, it appears that the beneficiary is the only employee within the company who is responsible for selling the petitioner's services. The lack of managers or subordinate employees for the beneficiary to direct in the sales and negotiating tasks for the U.S. company, and the job description indicating that the beneficiary is directly in charge of negotiating and meeting with clients, raises questions as to whether the beneficiary is managing these activities or actually performing duties related to sales and client relations. An employee who “primarily” performs the tasks necessary to produce a product or provide a service is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. at 604.

In addition, on appeal, counsel for the petitioner asserts that “the beneficiary is the President of a trucking company and he does not have anyone on his staff that is considered a “professional worker.” We contend that the trucking industry, especially for a business of similar size, i.e. with 4 employees, a ‘professional’ staff would not be needed.” The statutory definition of “managerial capacity” allows for both “personnel managers” and a “function manager.” See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word “manager,” the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(ii)(B)(3).

The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to

managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Furthermore, if the position offered to the beneficiary is executive in capacity, 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.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the petitioner has not established evidence that the beneficiary is in an executive capacity with the U.S. entity.

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.

At the time of filing, the petitioner was a five-year-old company that claimed to have a gross annual income of \$389,227. The firm employed the beneficiary as president, plus a manager, a logistics employee and two drivers, but failed to provide the requested job descriptions for three of its employees. Thus, the petitioner did not submit sufficient evidence that it employed subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might

plausibly be met by the services of the beneficiary as president and the manager and three additional employees whose duties have not been described. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, 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.

Based upon evidence submitted, it appears that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.