

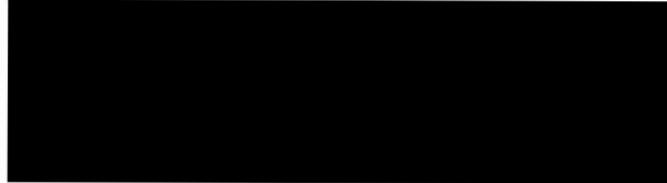
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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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**D7**

File: WAC 04 800 54582 Office: CALIFORNIA SERVICE CENTER Date: SEP 05 2006

IN RE: Petitioner:  
Beneficiary:



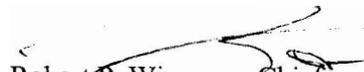
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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 visa petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California and is engaged in the business of software engineering. The petitioner claims a qualifying relationship with [REDACTED] a business entity located in Hong Kong. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted two extensions of two years each. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

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

The petitioner filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred and that the evidence submitted is sufficient to prove that the beneficiary is working in a managerial or executive capacity. In support of its appeal, the petitioner submits additional evidence.

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

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

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

managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(i) also provides that a visa petition may be extended by filing a new Form I-129. The petitioner does not need to supply supporting documentation unless requested by the director.

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

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in its petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although the petitioner states in its appeal that the beneficiary is serving in an executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. However, given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary is acting either in a managerial capacity *or* in an executive capacity and will consider both positions.

In the initial I-129 petition, the petitioner described the beneficiary's job duties as follows: "Continue to manage, operate and develop US subsidiary; plan, develop and establish policies of subsidiary according to board directives and organizational policies to coordinate functions and operations between parent company and its US subsidiary."

Further, in a letter dated August 16, 2004, the petitioner described the beneficiary's duties as follows:

In [the position of president], [the beneficiary] is responsible to set up the U.S. subsidiary; develop business and liaise between U.S. subsidiary and parent company; plan, develop and establish policies of subsidiary in accordance with board directives and corporation charter; confer with company officials to plan business objectives; develop organizational policies to coordinate functions and operations between parent company and U.S. subsidiary.

Finally, the petitioner submitted several organizational charts and wage report information for the petitioner. The most recent organizational chart shows the beneficiary at the top of the organization supervising an account manager and a software manager. The wage report for the quarter ending June 30, 2004 confirms that the petitioner employed three people including the beneficiary during this period. Additional wage reports further confirm that the petitioner has employed between three and five people, including the beneficiary, since March 31, 2003.

On October 15, 2004, the director requested additional evidence. Title 8 C.F.R. § 214.2(l)(14)(i) specifically permits the director to request supporting documentation in the context of an L-1 extension petition. The director requested, *inter alia*, information regarding the number of U.S. employees, a more detailed organizational chart, a more detailed description of the beneficiary's duties, quarterly wage reports, and a payroll summary including Forms W-2 and W-3.

In response, the petitioner submitted a letter dated December 19, 2004, confirming that the petitioner employs three people including the beneficiary. However, the petitioner explained that it has had problems recruiting full-time employees and that it currently employs five independent contractors. The petitioner also provided

the following details regarding the beneficiary's job duties:

Duties in the US: 40% of his time will be spent on setting up the Sales Division for the U.S. subsidiary and hire a qualified Sales Manager. Ever since the opening of [the petitioner], [the beneficiary] hired two Sales Manager[s] – [REDACTED] (US citizen) and [REDACTED] (US citizen) in 2000 and 2004 respectively. Each of them was being offered an annual salary of \$60,000 but none of them could produce more business on behalf of the company. [The beneficiary] will need to devote more time in 2005 to locate a qualified Sales Manager to oversee and increase the sales for [the petitioner], in addition to market [the petitioner's] service to corporate clients. This is very important because [the petitioner] generates more than 75% of total revenue for the parent company. Its existence is essential for the continue[d] success of [the petitioner]. 40% of his the [sic] time will be spent in developing new business opportunities by talking to Sony, Panasonic and other potential vendors bringing the company towards a new line of venture such as e-learning for disabled children; 15% of the time will be spent on planning, developing and establishing policies of subsidiary in accordance with board directives and corporation charter, conferring with company officials to plan business objectives and developing organizational policies to coordinate functions and operations between parent company and U.S. subsidiary; 5% of his time will be spent on reviewing monthly performance report on Engineers for the Technical Support Division. Please note that Beneficiary receives only general supervision or direction from Board of Directors and is not supervised by any body [sic] in the United States.

Finally, the petitioner supplied an updated organizational chart, information regarding the independent contractors, and a more recent wage report. The organizational chart is similar to the chart submitted with the initial petition in that it shows the beneficiary at the top of the organization supervising an account manager and a software manager. However, the updated chart also shows the beneficiary supervising localization engineers (independent contractors) through the software manager, one future employee, and one vacant position. The updated chart also described the two existing subordinate employees as follows:

**Account Manager**

[D]uties: manage customer key account.

Education: BS in Business Administration w/ concentration in Human Resources Management, San Jose State University, CA  
On Salary - \$63000/yr. US citizen

**Software Manager**

[D]uties: talk to customer's engineering staff to evaluate the localized software interface and the hardware and then discuss operational and performance requirements of the overall systems; design and convert customer's software program into Chinese languages

for users in Asia market; analyze software requirements to determine feasibility of design within time and cost constraints; consult with customer's engineering team concerning maintenance of software system and then develop software system testing procedures, programming, and documentation for customers.

Education: BS Computer Science Peking University  
On salary - \$50400/yr., H-1B [visa status]

The duties of three independent contractors (localization engineers) were described in the organizational chart as:

[P]erform linguistic translation, proofreading, post-editing and rewriting tasks for software, Help files, printed documentation and web-related materials; research and define glossary/terminology; perform linguistic testing on software applications; assist in customer/vendor communication during project execution.

Education: BS Engineering  
By hourly - \$32 - \$35 per hour; [permanent residents]

The most recent wage report submitted by the petitioner in response to the request for evidence confirms that it still employs three people, including the beneficiary.

On January 14, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. In support of this appeal, the petitioner includes a letter dated January 28, 2005 from the chairman of the foreign entity further detailing the beneficiary's duties as well as more evidence concerning the existence of the independent contractors. However, since the director's request for evidence specifically requested a more detailed description of the beneficiary's duties along with a breakdown of the percentage of time spent in each of the listed duties, the letter dated January 28, 2005 will not be considered in adjudicating this appeal. 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. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Upon review of the record of proceeding, petitioner's assertions on appeal are not persuasive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are

either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity. In support of its application, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "setting up" the sales division; developing new business; planning, developing, and establishing policies; and reviewing performance reports. The petitioner did not, however, define the policies or realistically explain what the beneficiary will do to "set up" the sales division or develop new business other than talking with prospective clients and hiring a sales manager. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

Moreover, the job descriptions for the beneficiary's subordinates fail to prove that these employees are supervisory, professional, or managerial. The account manager's job is described only as "manage customer key account," which provides no insight into this employee's true function. The software manager is described as providing services directly to customers. These services appear to be primarily related to designing and converting software into the Chinese language. The software manager, despite the organizational chart, is not given any specific supervisory duties over the independent contractors. The independent contractors are also described as providing services directly to customers. As such, except for their status as part-time contract employees, the independent contractors appear to be equal to the beneficiary's other subordinates. Given the beneficiary's vague job description and the descriptions of his subordinates' duties, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

While the record reveals the educational levels of the subordinate employees, it cannot be determined if they rise to the level of professional employees. 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 degrees held by the subordinate employees. 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 any of the software services provided to customers or for the management of customer key accounts.

Finally, the petitioner has not proven that the beneficiary manages an essential function of the organization. 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. 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 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. at 604). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

In addition, the petitioner's vague job description fails to realistically define the beneficiary's duties in a way that could allow one to ascertain which functions are managerial and which functions would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to properly quantify or define the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as developing new business, might not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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, *aff'd*, 905 F.2d 41.

Therefore, the record does not prove that the beneficiary is acting in a managerial capacity

Similarly, the petitioner has failed to prove that the beneficiary will act in an "executive" 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. 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 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-day 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.* As indicated above, the petitioner has failed to prove that the beneficiary, who is allegedly managing no more than two employees and three independent contractors who are apparently engaged in providing services to customers, will be acting primarily in an executive capacity.

It is appropriate 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).

Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve an application or petition where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engr. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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.

Finally, based on the reasons for the denial of the instant petition, a review of the prior L-1 nonimmigrant

petitions approved on behalf of the beneficiary is warranted to determine if they were also approved in error. Therefore, the director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(1)(9).

**ORDER:** The appeal is dismissed.

**FURTHER ORDERED:** The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(1)(9).