

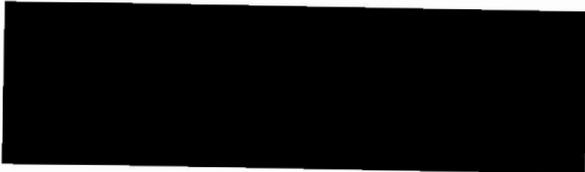


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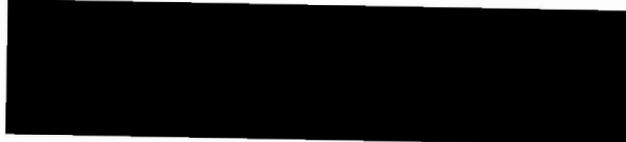
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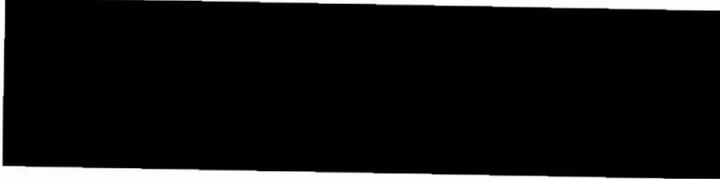
File: SRC-04-059-53880 Office: TEXAS SERVICE CENTER Date: SEP 05 2006

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:



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, Texas 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 qualify the employment of its financial consultant 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 Texas and is engaged in retail sales. The petitioner claims that it is the subsidiary of [REDACTED], located in Mumbai, India.

The director denied the petition concluding that: (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) had not been employed abroad in a 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 petitioner demonstrated eligibility and that the director's conclusions were in error. In support of this assertion, the petitioner submits additional documentation.

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 first 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.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

- Develop and implement financial plans of the firm by analyzing firm's financial status and utilizing investment strategies
- Compile and analyze financial information to prepare entries to accounts, such as general ledger accounts
- Document business transactions
- Direct business activities of the firm and examine firm's business operations to evaluate efficiency
- Set strategic financial planning goals
- Audit contracts, orders, and vouchers, and prepare reports to substantiate individual transactions prior to settlement
- Direct receipts and disbursements of funds and acquisition and sale of assets
- Analyze financial and operating statements of the firm
- Make reports and recommendations to the [m]anagement with regards to financial policies
- Establish, modify, document, and coordinate implementation of accounting and accounting control procedures. Devise and implement manual or computer-based system for general accounting
- Arrange for banking facilities and opening letters of credit
- Oversee work of finance and accounting personnel.

On January 5, 2004, the director requested additional evidence. Specifically, the director listed the definition of managerial and executive capacity and requested that counsel address inconsistent evidence that had been submitted with the petition.

In response, counsel for petitioner responded to the director's queries and submitted additional evidence in the form of organizational charts for the claimed qualifying organizations, percentage breakdown of duties for beneficiary's employment abroad and with the petitioner, and a letter from a former employer submitted as evidence of beneficiary's actual name.

On April 6, 2004, the director denied the petition. The director determined that the beneficiary had not been and would not be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that performance of duties constitutes management of a function and thus managerial capacity, and that beneficiary's duties are similar to that of a chief financial officer.

Upon review, counsel's assertions are not persuasive. Managerial and executive capacity are defined by statute. 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. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial or claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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).

On appeal counsel for the petitioner fails to clearly address the director's queries. It should be noted that the documentary evidence submitted in support of petitioner's assertions are devoid of specifics and it cannot be determined exactly what type of business petitioner is operating or in what context the beneficiary performs her duties. The only articulation concerning petitioner's conduct of business is by counsel who states that the petitioner "sells household products and grocery" items.

It is not clear from the record that the beneficiary will be operating in a managerial or executive capacity. The petitioner has submitted two different organizational charts which do not correspond. In addition these organizational charts reveal that a person with a title of president is also listed as a sales supervisor under the beneficiary, and that the person listed as vice president will also report to the beneficiary. This raises doubt about the actual capacity in which these two individuals are employed. Without a further articulation by the petitioner of how such an individual can perform as both the president and a sales manager under the beneficiary the organizational charts are of little probative value in establishing the facts surrounding beneficiary's employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the business, such as sales. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Counsel for petitioner makes numerous conclusory assertions regarding the beneficiary's employment capacity and cites several sources that are not in the pertinent regulations. The director acted properly in comparing the beneficiary's asserted duties with the proper standard established by statute and regulation. In addition, counsel's reasoning is circular and based on general characterization of the beneficiary's duties. The petitioner must demonstrate that the beneficiary is *actually* employed in a primarily managerial and executive capacity through the submission of probative documentary evidence. The materials cited by counsel are not related to this classification, and were not drafted specifically for this classification as the regulations cite above.

The petitioner's assertions of the beneficiary's duties are not supported by the record. In this case the record contains no corroborating evidence of the beneficiary's asserted duties, such as financial reports, market analysis, disbursements or documentation of business transactions. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The job description provided by counsel is repetitive and vague. 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). Statements such as "direct business activities of the organization and examining the business operations to evaluate financial efficiency" are too vague to be of any probative value.

Another example of the vague description of duties is the assertion that beneficiary will "prepare reports to substantiate individual transactions prior to settlement" and the duty to "establish, modify, document and coordinate accounting control procedures with the subordinate supervisor/manager personnel." Despite having provided an organizational chart that allegedly details who is and will be working for petitioner, this description does not detail who the "subordinate supervisor/manager personnel" is, nor is it clear that such employees have been hired by petitioner. Counsel adds that beneficiary will "[d]evise and implement manual or computer-based system for general accounting." This statement is vague as well, and could possibly mean beneficiary will program a cash register or install accounting software on an office computer. Thus, the petitioner's failure to document the record with evidence corroborating its assertions prevents CIS from determining the beneficiary's actual employment capacity.

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 description that clearly describes the duties to be performed, 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. 8 C.F.R. § 214.2(1)(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 there are other employees performing financial support services but it is not claimed that beneficiary manages these employees or their "financial" activities.

Counsel admits that this description of beneficiary's duties of is "broad" in his appeal brief. However, the regulations require a detailed, specific description of the beneficiary's daily activities. Based on the job a description alone the petitioner has indicated that the that beneficiary will be performing activities that comprise a part of the finance and accounting function and not managing it. The duties state that beneficiary will "compile and analyze . . . audit . . . establish, modify and document" as opposed to directing any of these activities or duties. Counsel also mistakenly confuses discretionary authority over how the beneficiary's work product is completed with having discretionary authority over the accounting of finance function of the petitioner. In this case, the beneficiary is not reviewing the work of other financial employees, does not have authority over the day-to-day operations of a financial department, and does not organize or direct a financial department of the petitioner.

Counsel for petitioner mischaracterizes the director's decision as being based on staffing levels. The director's conclusions were based on the fact that the petitioner failed to support its assertions that the beneficiary was supervising other employees in prosecuting the finance and managerial functions. The director did not state that the petition was denied based on staffing levels. In order to qualify as a "function manager" the petitioner must demonstrate that the beneficiary actually manages the function as opposed to performing the function. If the record does not support the existence of the claimed employees who perform the functions then the petitioner's assertion is not credible. Thus, the decision was not based on the petitioner's staffing levels, but on the fact that the petitioner's assertions were not credible because the record did not support the existence of employees that would perform the duties asserted by petitioner.

The record 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, 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). Furthermore, 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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this matter is whether the beneficiary was employed abroad in a managerial or executive capacity. The organizational chart submitted indicates that the beneficiary did not have authority over the day-to-day activities of other employees performing financial functions. These employees have the title "Senior Executive – Finance" and "Finance Head." The beneficiary's title was "financial consultant." According to the lay out of the organizational chart the beneficiary appears to be placed above one employee but has a lesser title. Either the titles of the employees are inflated or the organizational chart is not accurate in depicting the actual hierarchy of the business. Given the other inconsistencies in the record and the director's request for evidence, the organizational chart alone is not sufficient to carry the petitioner's burden. As with other assertions in the petition, the petitioner's assertions on this issue are not supported by the record.

There is also a significant discrepancy in the record as the organizational chart submitted for the foreign qualifying organization has been altered from its initial submission. *Contra* Organizational chart, attached hereto as petitioner's appeal exhibit 1 (showing the "senior executive – finance" under beneficiary); Organizational chart, attached hereto as petitioner's initial exhibit 9 (showing no other employee under beneficiary). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The organizational chart for the foreign organization has been altered from its original form, and the AAO thus rejects the organizational chart for the truth of the matter asserted – that the beneficiary occupied a position of managerial or executive capacity while employed abroad.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Beyond the decision of the director there does not appear to be a qualifying relationship. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary.

In this case the petitioner is incorporated and thus a distinct entity and not a branch office of the same employer. The I-129 form alleges that 51% of its organization is owned by the foreign organization, however the stock certificate submitted by counsel shows that the foreign organization only owns 12,750 of 1,000,000 authorized shares. Furthermore, the petitioner has submitted only certificate seventeen, without disclosing the ownership of numbers one through sixteen. As such, the petitioner has not established that it has a qualifying relationship with a qualifying organization.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

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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.