

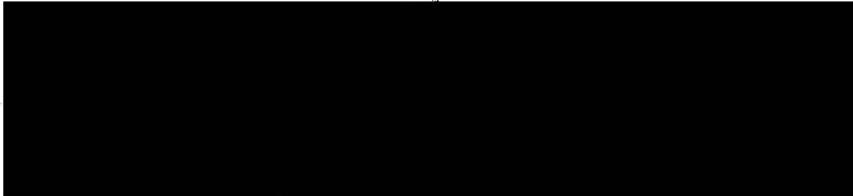
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U.S. Citizenship
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Services

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File: WAC 04 109 50389 Office: CALIFORNIA SERVICE CENTER Date: **SEP 22 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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an organization incorporated in the State of California in August 2001. It operates a Japanese restaurant. It seeks to extend the temporary employment of the beneficiary as president of the petitioner for an additional two years. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition on May 6, 2004, determining that the petitioner had failed to establish that the beneficiary would be employed as a manager or executive for the United States entity.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) based its decision on an erroneous legal conclusion. Counsel asserts that the beneficiary is not a first-line manager, that the beneficiary's immediate subordinate is a manager, that the beneficiary's subordinates need not perform professional services, and that the petitioner has a sufficient number of employees to relieve the beneficiary from performing non-qualifying duties. Counsel submits a brief and documentation in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) 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 issue in this matter is whether the petitioner established that the beneficiary would be employed by the United States entity in a 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.

In a February 27, 2004 letter appended to the petition, the petitioner indicated that:

Beneficiary will continue to be responsible for the direction and development of Petitioner's activities in the United States. This will involve the executive oversight of the performances of corporate staff in areas of Planning, Staffing, Budgeting and Administration. As outlined in the attached block staffing chart, there are and will be sufficient personnel/staff to run the day-to-day operation of the restaurant. Beneficiary has not and will not be involved in the daily activities of the restaurant operations as it has a Restaurant Manager, cooks, waiters and waitresses who are sufficient to handle the activities of the restaurant.

The petitioner added that the beneficiary spent 45 percent of her time directing the management of the organization including: 15 percent reviewing reports from the vice-president/managing director, restaurant manager, and other key restaurant staff and meeting with the managerial staff on a daily basis to discuss operational directions, market trends and economic impact, etc.; 10 percent rendering executive oversight on the management of the entire operation and its management profile through her immediate subordinate, the vice-president/managing director; and 20 percent managing the performances of in-house managerial staff who in turn, manage and supervise various operational activities such as daily restaurant services, food preparation, financial and accounting and general operational administration, as well as making short and intermittent trips to the restaurant for the purpose of ensuring the restaurant is operating in a satisfactory manner and talking to restaurant workers and customers to obtain feedback.

The petitioner indicated that the beneficiary spent 20 percent of her time establishing the company's policies and goals including: 10 percent reviewing market trends including review of market research reports furnished by the vice-president/managing director, and recommendations from the restaurant manager and head chef for new food items; 5 percent planning and directing the possible expansion of the operation; and 5 percent participating in industry related functions to keep abreast of the business' competitiveness in the marketplace.

The petitioner noted that the beneficiary spent 25 percent of her time exercising wide latitude in discretionary decision making including: 10 percent directing sales revenue and costs; 5 percent implementing and directing effective financial control between the U.S. entity and the foreign parent company; 5 percent discussing potential contracts, and possible business litigation with a legal advisor; and 5 percent reviewing corporate and legal documents with business lawyers.

The petitioner indicated that the beneficiary spent 10 percent of her time maintaining autonomy over the petitioner's operations including: 5 percent managing and maintaining the relationship with the parent company; and 5 percent traveling to attend board of director's meetings. The petitioner also noted that the beneficiary would not be supervised by any of the U.S. personnel.

The petitioner also provided job descriptions for the beneficiary's subordinates including the vice-president/managing director, the accountant, and the restaurant manager. The petitioner described the vice-president/managing director's position as:

He will assist the Beneficiary in making business decisions to implement newly developed techniques and strategies. He will recommend strategic planning regarding complex business policies and operation issues and problems. He will identify critical operational performance deficiencies. He will manage resources planning and delegate job responsibilities to the Restaurant Manager to manage the daily restaurant activities. He has immediate management authority over the Restaurant Manager and the Accountant. He is responsible for gathering financial records from the Accountant and will report to the Beneficiary to allow her to make chief financial decisions in support of the business operation and development.

The petitioner indicated that the "accountant" is responsible for daily receivables and payables, monthly income and expense statements, payroll withholding and reporting, preparing financial budgeting and forecasting, and compiling and preparing monthly, quarterly, and yearly profit and loss statements and balance sheets for filing corporate tax returns. The petitioner indicated that the restaurant manager plans and organizes the menu, delegates and assigns job responsibilities, supervises the daily restaurant performance, and has authority to hire additional part-time and full-time workers.

The petitioner's organizational chart showed the beneficiary in the position of president and listed the vice-president/managing director as her immediate subordinate. The vice-president/managing director's immediate subordinates included the "accountant," independent contractors and advisors identified as a certified public accountant, a lawyer, a broker, and the restaurant manager. The organizational chart showed a cook (head chef), three cooks, and five servers reporting to the restaurant manager.

On March 17, 2004, the director requested among other things: (1) the petitioner's organizational chart describing its managerial hierarchy and staffing levels, including the current names of all executives, managers, supervisors, the number of employees within each department and listing all employees under the beneficiary's supervision by name, job title, brief description of their job duties, educational level, and annual salaries/wages; (2) the petitioner's California Forms DE-6, Quarterly Wage Report for all employees for the last quarter accepted by the State of California; and (3) a list of the goals and policies the beneficiary had established the last six months, a list of the specific discretionary decisions that the beneficiary had exercised over the last six months, and a specific day-to-day description of the duties the beneficiary had performed over the last six months.

In an April 13, 2004 response, counsel for the petitioner noted that the beneficiary had been at the foreign entity since the beginning of 2004. Counsel noted that in the last six months the beneficiary had been in the United States, the beneficiary had secured the profitable status of the petitioner's restaurant, coordinated reporting systems with the parent entity, set policies to obtain the goal of expanding the U.S. entity to a holding company by participating in industry related trade shows, sought additional business opportunities by hiring an in-house business development advisor, and had created a corporate management team capable of operating the restaurant and attending to future business expansion needs. Counsel indicated that the

beneficiary had formulated procedures to secure business revenues by internal restructuring, and improving services, marketing, and promotion.

Counsel re-stated the initial description of the beneficiary's duties. The petitioner also provided an organizational chart that included the names of its employees and a list of the employees' job duties. The petitioner provided job descriptions similar to the initial descriptions provided for the vice-president/managing director, "accountant," and restaurant manager. The petitioner also included a job description for the newly hired business development advisor indicating that the individual in this position had a high school education and assisted in the development of business base and expansion, planned and suggested business opportunities for the company, and worked with outside contract business brokers and agents.

The petitioner also provided its California Form DE-6, Quarterly Wage and Withholding Report, for the first quarter of 2004, the quarter in which the petition was filed. The California Form DE-6 confirmed that the petitioner had employed seven employees in January 2004 and 14 employees in February and March 2004. The list of employees corresponded to the names shown on the petitioner's organizational chart. The record also includes the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for 2002 and 2003. On Schedule E of the petitioner's 2002 and 2003 IRS Form 1120, the petitioner lists the beneficiary and the individual identified as "accountant" as officers of the corporation. On the petitioner's 2003 IRS Form 1120, Schedule E, the petitioner notes that the "accountant" devotes only 20 percent of his or her time to the corporation.

On May 6, 2004, the director denied the petition determining that the petitioner's California Form DE-6 showed that the petitioner employed all but the vice-president/managing director and the restaurant manager part-time and that the vice-president/managing director earned only \$18,000 annually as indicated on the vice-president/managing director's IRS Form W-2, Wage and Tax Statement for 2003. The director determined that: "With twelve part-time employees, one Vice[-]President performing non[-]professional duties and one full[-]time Restaurant Manager with a high school education, it is concluded that the beneficiary must be involved in the daily business activities of the petitioning company." The director concluded that the evidence is insufficient to demonstrate that the beneficiary had been or would be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner contends that the director misread the petitioner's organizational chart and staffing structure. Counsel asserts that the petitioner's organizational chart clearly shows that the beneficiary manages at least "two-tiers" of managerial/supervisory employees. Counsel explains that the petitioner's corporate staff, made up of the vice-president/managing director, the part-time accountant, the part-time business advisor, and the full-time restaurant manager, is to assist the beneficiary in developing the company's business and expanding its existing restaurant business. Counsel disputes the director's determination that the beneficiary directly supervises the restaurant manager and notes that the 10 full-time and part-time restaurant workers report to the restaurant manager, not to the vice-president/managing director.

Counsel asserts that the beneficiary's immediate subordinate, the vice-president/managing director is a full-time managerial employee. Counsel explains that the petitioner and the foreign entity both pay the

vice-president/managing director his annual salary of \$36,000. Counsel contends that the vice-president/managing director's management of the restaurant manager makes the vice-president/managing director a managerial/supervisory employee; thus making the beneficiary a second level manager. Counsel disputes the director's implication that the beneficiary must supervise professional employees.

Counsel argues that the director did not raise any objection to the senior managerial/executive duties provided and did not make a determination on the beneficiary's job duties but rather on the number of the petitioner's part-time staff and on the beneficiary's failure to manage professional employees. Counsel asserts that neither the number of staff nor the beneficiary's lack of supervision of professional employees is relevant to this matter.

Counsel's assertions 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. § 204.5(j)(5). In this matter, the petitioner provides a generic description of the beneficiary's duties that does not delineate the beneficiary's actual duties. 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 petitioner indicates that the beneficiary reviews reports and meets with staff, "renders executive oversight," reviews market trends, plans the expansion of the business, directs sales revenue and costs, implements effective financial control, reviews corporate and legal documents, and maintains the petitioner's relationship with the foreign entity. These statements vaguely reference duties that include the general oversight exercised by an owner of an organization. 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. at 1103.

The petitioner's description of the beneficiary's decision-making while in the United States does not provide insight into the beneficiary's actual daily duties. The petitioner indicated that the beneficiary had secured the profitable status of the petitioner's restaurant, coordinated reporting systems with the parent entity, set policies to obtain the goal of expanding the U.S. entity to a holding company by participating in industry related trade shows, sought additional business opportunities, and created a corporate management team. However, the record does not provide the specificity necessary to elevate the beneficiary's position to an executive or managerial position. 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. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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-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 sole managerial employee.

In this matter, counsel for the petitioner asserts that the individual in the position of vice-president/managing director is the individual who provides this essential managerial tier necessary to identify and promote the beneficiary to an executive level. The AAO observes, however that the petitioner fails to recognize the vice-president/managing director as an officer of the organization on its IRS Forms 1120. This failure to recognize a vice-president while recognizing the petitioner's bookkeeper raises questions regarding the legitimacy of the petitioner's organizational structure. 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).

In addition, the petitioner provides a generic description for the vice-president/managing director's duties. The petitioner indicates that the vice-president/managing director assists the beneficiary in making business decisions, recommends strategic planning, identifies operational deficiencies, and delegates job responsibilities to the restaurant manager. It is not clear whether it is the beneficiary or it is the vice-president/managing director who is actually making the business decisions and planning business strategies. It is only the delegation of the job responsibilities to the purported restaurant manager that indicates that the vice-president/managing director might performs some supervisory duties. However, the record does not indicate how much time the vice-president/managing director devotes to this duty nor does the record contain any documentary evidence to substantiate the vice-president/managing director's supervisory role. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that, according to the petitioner's menu that was submitted for the record, the restaurant is open seven days a week for a total of 72 hours. The petitioner does not explain how a single restaurant manager earning \$1500 per month could supervise the operations at all times. The fact that there are no other managerial or supervisory employees other than the "vice president/managing director" and the beneficiary necessarily casts doubt as to whether the Vice President actually supervises the restaurant manager.

Upon review of the information contained in the record regarding the vice-president/managing director and his duties, the AAO finds that the description of duties is general and interchangeable with the description of the beneficiary's duties and is not sufficient to substantiate that this individual actually performs managerial or supervisory duties. The record does not establish that the vice-president/managing director's position provides an essential tier of managerial employees for the beneficiary to direct so that the beneficiary would primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

The AAO acknowledges that the beneficiary hired a part-time business advisor and employs an individual to perform the petitioner's bookkeeping services in addition to the employees who operate the petitioner's restaurant, but the record does not establish that these two individuals' duties comprise managerial/supervisory/professional duties. Likewise, the petitioner's description of the restaurant manager's duties and a review of the restaurant's business and staff fail to convince that the individual in the position identified as restaurant manager spends the majority of his or her time supervising employees, rather than primarily participating in the daily operational and administrative tasks of the restaurant. The AAO notes that the beneficiary also spends time at the restaurant to ensure its satisfactory operation and to obtain feedback, a task that is not managerial or executive in nature. However, 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).

In this matter, the petitioner's description of the beneficiary's direct subordinates' duties is insufficient to demonstrate that these positions require individuals who perform primarily professional, managerial, or supervisory tasks. The petitioner's indication that these individuals assist the beneficiary in certain endeavors undermines the managerial and executive nature of both the beneficiary and subordinates' duties. The remaining portion of the beneficiary's subordinates' duties demonstrates that these individual primarily perform the operational and administrative tasks of the company. The record is insufficient to show that the beneficiary's subordinates act primarily as supervisors. Again, 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. at 165. The record must substantiate that the duties of the beneficiary and all 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. The petitioner has not provided sufficient documentary evidence substantiating that the beneficiary has or will perform primarily in an executive or managerial capacity.

Based on the record in this matter when the petition was filed, the petitioner has not demonstrated that it has attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. The petitioner's generic description of the beneficiary's duties, the similarity of the beneficiary's duties to others "managerial" employees in the organization, and the lack of documentary evidence substantiating the beneficiary's decision-making all contribute to the petitioner's failure to establish that the beneficiary will be employed in a primarily managerial or executive capacity for the petitioner.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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). 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). Where as here, the petitioner has not provided an adequate description of the beneficiary's duties or provided documentary evidence of the beneficiary's decision-making processes when the petition was filed, the AAO cannot conclude that the beneficiary's duties are primarily managerial or executive. An executive or manager's duties must be the critical factor. In this matter, the record is deficient in establishing the actual duties of the beneficiary or that those duties comprise primarily managerial or executive duties. For this reason, the petition will not be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.