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FILE: WAC 06 064 53330 Office: CALIFORNIA SERVICE CENTER Date: APR 04 2007

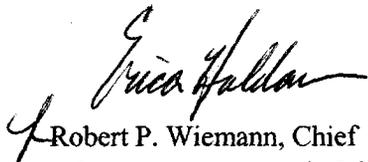
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[Redacted]

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 filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California company, states that it is a supplier of commercial and industrial janitorial services. The petitioner claims that it is the subsidiary of Danish Environment, Denmark, located in Aalborg, Denmark. The petitioner seeks to employ the beneficiary in the position of vice president/director of development for a two-year period.

The director denied the petition on April 12, 2006, concluding that there is insufficient evidence to demonstrate that the beneficiary will serve in a primarily managerial or executive capacity in the United States.

Counsel for the petitioner subsequently filed an appeal on April 28, 2006. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will in fact hold an executive position in the United States. In addition, counsel for the petitioner clarifies a discrepancy in the U.S. entity's staffing as noted by the director in the decision. In support of this assertion, the petitioner submits additional evidence.

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

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

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

prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

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

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

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

The nonimmigrant petition was filed on December 21, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of Vice President/Director of Development. In a letter of support dated December 12, 2005, the beneficiary's proposed duties in the United States are described as the following:

The transfer of [the beneficiary] is part of a plan to expand the reach of the business in the United States to customers in a multi-state region that desire efficient, economical janitorial services. A United States presence by [the beneficiary] is essential in order to properly manage and expand the current operations. The U.S. operations have grown large enough the require a person with [the beneficiary's] skills and experience in order to expand its operations as the management of the current operations is more than enough to occupy the time of the president. [The beneficiary's] services will ensure that the ambitious expansion plans of [the U.S. entity] are carried out.

\* \* \*

[The beneficiary] will act as the Director of Development and Vice President of [the U.S. entity]. He will be responsible for developing and expansion of the U.S. business into a multi-state operations [sic] by forming strategic alliances as well as establishing business relationships leading to current as well as future expansion of business operations. [The beneficiary] will have the authority to negotiate, set prices, and enter into contracts on behalf of [the U.S. entity]. He will also be able to hire support staff as needed.

The petitioner also submitted the current organizational chart of the U.S. entity. The chart indicates the president as the head of the company and the head of the service and sales departments. The chart also indicates that the president supervises one employee in the office department, one supervisor of the day porter services department, and two supervisors in the janitorial services department for two separate areas. The chart shows that the same individual is the supervisor of the day porter services department and the supervisor of the janitorial department located in Los Angeles. The chart also indicates that the supervisors in turn supervise the day porters and the janitors. The beneficiary's proposed position is not listed on this chart.

In addition, the petitioner submitted a list of the U.S. entity's employees. According to the list, the U.S. entity employs one president, one secretary, two supervisors, two floor maintenance employees, seven day porters, and fifty-one janitors. The U.S. entity employs a total of 64 employees. The petitioner also submitted the U.S. entity's payroll summary, dated October 31, 2005, which confirms the employment of 64 individuals.

On January 12, 2006, the director requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested: (1) a copy of the U.S. company's organizational chart indicating the current names of all executives, managers and supervisors, and the names, job titles, job duties, educational level, annual salaries/wages for all employees under the beneficiary's supervision; (2) a more detailed description of the beneficiary's proposed duties in the U.S., including the employees under his supervision and the percentage of time spent on each duty; (3) copies of the California Employment Development Department Forms DE-6, Quarterly Wage Report, for the last four quarters; (4) copies of the U.S. company's payroll summary, Forms W-2 and W-3 and Form 1099, if applicable; and, (5) copies of the company's IRS Form 941, Employer's Quarterly Federal Tax Return, for the last four quarters.

In its response dated March 21, 2006, the petitioner submitted an organizational chart of the U.S. company. The chart indicates the president as the head of the office and the head of the service and sales departments. The chart also indicates that the president supervises the secretary in the office department and the beneficiary as the head of the development department. The chart indicates that the president supervises the supervisor of the day porter services, the supervisor of the janitorial services for San Fernando Valley, the supervisor of the janitorial services for Los Angeles and the beneficiary as supervisor of the San Fernando Valley location. Finally, the supervisors supervise the day porters and janitors. According to the chart, it appears that the beneficiary will be the head of the development department and a supervisor of the San Fernando Valley location. In addition, the beneficiary will supervise the supervisor of the San Fernando Valley location, who in turn supervises the janitors. The chart does not indicate the number of janitors employed in the San Fernando Valley location. The petitioner also submitted a list of employees of the U.S. entity that includes 67 employees. The chart fails to list the individuals in each position, the job duties for each position, the educational level, and the salaries and wages for each employee as requested by the director.

The petitioner submitted payroll summaries for the U.S. entity from January 28, 2005 until February 15, 2006. In addition, the petitioner submitted the Form W-2 list for 2005. The petitioner did not submit the state or federal employer quarterly tax returns as requested by the petitioner. Instead, the petitioner submitted a letter from Applied Underwriters, the company in charge of the U.S. entity's payroll, which stated that the company will not disclose the Form DE-6, Quarterly Wage Report, since they are "required to protect our client's confidential information including that of their employees." Thus, the petitioner submitted a payroll summary, which confirms the employment of the individuals listed on the employee list.

The petitioner also submitted a letter, dated February, 2006 that specified the proposed duties of the beneficiary in the United States as the following:

[The beneficiary] is the Director of Development and has been transferred from the Danish company due to his great experience in this field. [The beneficiary] has over the years specialized in forming business alliances and producing tools and resources used in the field of expanding and developing business in this particular service industry. [The beneficiary] is not only [sic] knows this particular industry extremely well but is an architect within our company.

In our U.S. company [the beneficiary's] core duties are the following:

- Identify and create winning expansion strategies.
- Take primary responsibility for the design, implementation and maintenance of the expansion.
- Responsibility of this project and ensure that the necessary selection tools and procedures are culturally sensitive and appropriately translated for use by all staff in other states than only California.
- Future education of staff in the use and interpretation of [the petitioner's] service and company culture.
- Create and maintain new business relationships, negotiate annual contracts.

Also, [the beneficiary] has a limited amount of supervision in order for him to get acquainted with our current staff and the way they operate, communicate and manage.

The split in the work duties are approximately: 25% supervision 75% development.

In the director's decision dated April 12, 2006, the director noted that the U.S. entity's organizational chart indicated that the beneficiary would be the head of the development department and the head of the janitorial services of the San Fernando Valley area. The director also noted that the beneficiary will supervise the supervisor of the San Fernando Valley, however, that same supervisor is also listed on the same tier as the beneficiary. In addition, the director noted that the proposed duties of the beneficiary "qualify as performing tasks necessary to provide a service or produce a product." The director further noted that the petitioner submitted insufficient evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Consequently, the director denied the petition.

On appeal, counsel for the petitioner explains that the beneficiary will supervise the supervisor of janitorial services in the San Fernando Valley area, and thus that supervisor is not on the same level as the beneficiary. Counsel also states that the duties "relating to the development of new operations are managerial in nature." Counsel further states that the "current person responsible for such management duties is too engrossed in the current business operations to successfully and prudently expand the business. He needs managerial/executive assistance in order to avoid dropping new business opportunities within his grasp." The petitioner submits a revised organizational chart of the U.S. entity and a letter from the president of the U.S. entity.

In the letter by the president of the U.S. entity, the president explains that the U.S. entity wishes to expand its operations and that he needs assistance with this endeavor. The president also explains "as part of my development work, I examine new markets and make proposals for new business" and many of the proposals "are being seriously considered by prospective clients." The president also states that he is "stretched too thin to accommodate the prospective clients" and it is imperative that the beneficiary starts in the position of Director of Development to "develop business in new areas, implement our business procedures, and thereby duplicate the success we have enjoyed in other regions."

In addition, the petitioner submits a new organizational chart of the U.S. entity. The chart is similar to the previously submitted chart, however, the beneficiary is now only in the position of director of development and is no longer listed as the supervisor of the San Fernando Valley area. In addition, this revised chart now indicates that the beneficiary will supervise all of the supervisors and their support staff. The chart also includes two new offices "to be developed."

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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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

The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such as the beneficiary will "identify and create winning expansion strategies"; "take primary responsibility for the design, implementation and maintenance of the expansion"; "responsibility of this project and ensure that the necessary selection tools and procedures are culturally sensitive and appropriately translated for use by all staff in other states than only California"; and "create and maintain new business relationships, negotiate annual contracts." The petitioner has neither explained in detail the plans for its expansion, nor explained what the beneficiary's role will be in supervising personnel. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States. The petitioner did not submit the requested job description as requested by the director. Instead, the petitioner reiterated most of the job duties described in the original job description. In addition, the petitioner requested a description of the duties performed by the employees supervised by the beneficiary which it failed to submit. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. For this reason alone, the appeal will be dismissed.

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

In addition, in a letter by the president of the U.S. entity that was submitted on appeal, the president explains that there are several companies interested in the U.S. entity's proposals, however, the petitioner has failed to provide any evidence as to the business plan for expanding the U.S. operations and if it is actually feasible to do so. 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)). Since the petitioner failed to document interested clients or market research relating to a possible expansion, several of the beneficiary's responsibilities may be merely speculative. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In addition, the petitioner submitted two organizational charts that are very different from each other. In the first organizational chart, the beneficiary is both the director of development and the supervisor of janitorial services in the San Fernando Valley region. The first chart also indicated that the beneficiary will supervise the supervisor of that region. However, on appeal, the petitioner submits a revised organizational chart that indicated that the beneficiary supervises all of the supervisors, porters, and janitorial staff. It appears that the beneficiary's responsibilities have been elevated. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The record shows that as of the date of filing, the petitioner asserts that the beneficiary will control and direct subordinate managerial staff. According to the organizational chart, the beneficiary will supervise the supervisor of the San Fernando region, who in turn supervises the janitors. Although the beneficiary is not required to supervise personnel, if it is claimed that his managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the administrative and scheduling functions of the supervisor, who is the beneficiary's subordinate. Thus, the petitioner has not shown that the beneficiary's subordinate employee is professional as required by section 101(a)(44)(A)(ii) of the Act.

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

enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* 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. at 604. As the beneficiary will supervise one supervisor, the petitioner has not established a complex organizational structure which would elevate the beneficiary to an executive-level position. In the instant matter, the petitioner has not established evidence that the beneficiary will be employed in an executive capacity with the U.S. entity.

Furthermore, the petitioner has not established that the beneficiary will be managing an essential function of the "development and expansion" of the U.S. company as the director of development. 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 neither claimed nor provided evidence that the beneficiary manages an essential function.

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the development functions for 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 a "function manager" as contemplated by the governing statute and regulations.

According to the organizational chart submitted with the petition, the beneficiary will supervise the supervisor of janitorial services for the San Fernando Valley area, but does not have any subordinates in the development department. Thus, it appears that the beneficiary will be performing all of the market research, marketing and sales, financial development, negotiations, and client development. 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. at 604. Based on the foregoing

discussion, there is insufficient evidence to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

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.