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20 Massachusetts Ave., N.W., Rm. A3000
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U.S. Citizenship
and Immigration
Services

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File: WAC 05 190 50369 Office: CALIFORNIA SERVICE CENTER Date: **APR 08 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)

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, 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 petition seeking to employ the beneficiary as its "international sales director and executive negotiator" 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 corporation organized under the laws of the State of California, claims to be engaged in the business of international travel arrangements and reservations. The director denied the petition concluding that the petitioner failed to establish that (1) the beneficiary will be employed primarily in a managerial or executive capacity; or (2) the beneficiary has been employed by the foreign entity primarily in a managerial or executive capacity.

An appeal was subsequently filed. 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 in denying the petition because the record establishes that the beneficiary will be, and has been, employed primarily as an executive or "function" manager.

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 has been employed by the overseas 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 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, and implies on appeal that the beneficiary will be acting as both an executive and a manager. 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. Given the ambiguity, the AAO will consider the appeal as if the petitioner is asserting that the beneficiary will be employed primarily as either an executive *or* a manager and will consider both classifications.

In response to the director's Request for Evidence, the petitioner provided the following description of the beneficiary's duties overseas in a letter dated July 21, 2005:

- Create strategic plan for company, including methodology to increase sales by maintaining top sales offerings in the marketplace and introducing new products;
- Implement those strategic sales and marketing plans for agencies and suppliers;
- Create and supervise implementation of a measurable system that ensures efficiencies and increases in sales;
- Work with vendors to identify and achieve travel guidelines, including negotiating rates, services, cooperative marketing campaigns, products, product revisions, and contracts;
- Responsible for identifying markets and areas that need further development through analysis of staff marketing reports;
- Review sales production analysis reports;
- Analyze, assess, and take appropriate measures on Agency Plans, which provide updates on products with poor performance, as well as highlights on training deficiencies;
- Continually evaluate existing and potential product opportunities through sales and competitive analysis to ensure continued growth and maximum competitive advantage;
- Develop and maintain superior competitive position through supplier relationships;
- Evaluate the effectiveness of marketing plans through analysis of results based on projected goals and objectives; and
- Interview, review, hire and terminate employees.

The petitioner also provided a breakdown of how much time the beneficiary spends on each duty, with the explanation that the amount of time she spends on each duty may fluctuate:

- Sales, Marketing and Business Development – 70%
- Human Resource Management – 20%
- Operations Management – 10%

The petitioner further described the beneficiary's overseas duties in a letter dated July 19, 2005, which was also provided in response to the director's Request for Evidence:

Review and analyze proposals submitted by various tour wholesales [sic], airline reservation systems, hotel chains and other vendors. Consider feasibility and make recommendations to directors of company. Develop and implement method for monitoring customer satisfaction, rewards programs offers and special promotions offers to coincide with company sales

targets. Hire, recruit and train staff. Evaluate performance and develop sales goals for each quarter. Monitor records for expenditures and devise methods to streamline operations. Attend trade shows as an executive of the company in order to relay information about the travel business field. Organize services as associated with ground-handling companies including but not limited to: coach companies, limousine services, bilingual driver/guides, etc[.] from a multitude of countries in order to negotiate, leverage and secure contractual rates as well as chronicle new destination. Expand [the foreign entity's] portfolio through identification of additional opportunities in key geographic areas as well as research and implement new destination packages with regards to client demand and contractual rates (hotels and transportation). Participate and contribute to [the foreign entity's] operations group initiatives and planning.

The petitioner also provided an organizational chart for the foreign entity. The beneficiary is portrayed as reporting to the director of operations and as having no supervisory responsibilities over other employees.

On August 2, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary has been employed by the foreign entity primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary has been employed primarily as an executive or "function" manager. Counsel argues that, as the employee responsible for the foreign entity's sales and marketing, she may be classified as an executive or manager.

Upon review, the petitioner'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. § 214.2(l)(3)(ii) and (iv). 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.

The petitioner has failed to establish that the beneficiary is acting in a "managerial" capacity. In support of its petition, 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 will create a strategic plan, implement and evaluate marketing plans, and create and implement "a measurable system that ensures efficiencies and increases in sales." The petitioner did not, however, specifically define any of these plans or systems. Additionally, although the beneficiary is described as spending 20% of her time on human resources management, the beneficiary does not supervise other employees. The petitioner does not explain what, exactly, the beneficiary will be doing on a day-to-day basis

to manage human resources in the absence of having any supervisory responsibility over subordinate employees. 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).

Likewise, the job description provided by the petitioner describes the beneficiary as primarily engaged in performing non-qualifying administrative or operational tasks, which do not rise to the level of managerial duties. The beneficiary is described as primarily engaged in performing marketing and sales tasks. Tasks such as acquiring services from ground-handling companies and working directly with vendors are not qualifying managerial duties. Moreover, in the absence of any subordinate staff available to relieve the beneficiary of the need to perform the non-qualifying tasks inherent to her duties, it must be concluded that she is performing these tasks herself. 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). While counsel asserts on appeal that the tasks being performed by the beneficiary are not necessary to provide a service as those tasks are performed by the travel agencies, counsel's argument is not persuasive. The record indicates that the beneficiary is primarily performing, and not managing through other employees, those non-qualifying tasks necessary to the performance of sales and marketing duties, which is the "service" being provided. The performance of primarily non-qualifying tasks will not result in the beneficiary being classified as a managerial employee regardless of whether the service is being provided to customers, vendors, or the employer.

The petitioner also failed to prove that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees, or that she manages an essential function within the organization. As admitted by the petitioner, the beneficiary does not supervise or control other employees. Therefore, the petitioner must establish 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.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Again, in the absence of any

subordinate staff available to relieve the beneficiary of the need to perform the non-qualifying tasks inherent to her duties, it must be concluded that she is performing these tasks herself. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her 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). Therefore, the record does not establish that the beneficiary will be 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 not relieved by other employees from performing the non-qualifying tasks inherent in her duties and who appears to be primarily engaged in performing sales and marketing tasks, will be acting primarily in an executive capacity.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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. In this matter, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(1)(3).

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

In the letter dated July 21, 2005 provided in response to the Request for Evidence, the petitioner indicated that

the beneficiary's responsibilities in the United States will be "essentially the same" as her responsibilities with the foreign entity in the United Kingdom. The petitioner also provided an organizational chart for the United States operation. According to the chart, the beneficiary will report to the president and will supervise three sales representatives. Specific job descriptions or education levels for the sales representatives were not provided.

On August 2, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary will be employed primarily as an executive or "function" manager. Counsel argues that, as the employee responsible for sales and marketing, she may be classified as an executive or manager.

Upon review, the petitioner's assertions are not persuasive.

As explained above, 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 petitioner has failed to establish that the beneficiary will act in a "managerial" capacity in the United States for the same reasons articulated for the position in the United Kingdom. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. Moreover, the job description provided by the petitioner describes the beneficiary as being primarily engaged in performing non-qualifying administrative or operational tasks, which do not rise to the level of managerial duties. 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; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Although the petitioner indicates in the organizational chart that the beneficiary will supervise three sales representatives, the petitioner failed to provide any job descriptions for these subordinate employees or to give details regarding their educational levels. Therefore, as it cannot be determined if these employees have a supervisory or managerial function, or are professionals, the petitioner failed to establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees. It appears that the beneficiary will act as a first-line supervisor. 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. Moreover, in the absence of job descriptions, it cannot be determined whether these subordinate employees will relieve the beneficiary of the need to perform the non-qualifying administrative or operational tasks inherent in her sales and marketing duties. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Also, the petitioner has not established that the beneficiary will manage an essential function of the United States operation for the same reasons articulated above. The petitioner's vague job description, which indicates that she will likely be a first-line supervisor in addition to performing administrative or operational tasks, fails to document what proportion of the beneficiary's duties will be managerial functions and what proportion will be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc.*, 48 F. Supp. 2d at 24.

Similarly, the petitioner has failed to prove that the beneficiary will act in an "executive" capacity. As indicated above, the petitioner has failed to establish that the beneficiary, who will allegedly manage sales representatives and perform non-qualifying administrative or operational tasks, will act primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States as required by 8 C.F.R. § 214.2(1)(3).

Beyond the decision of the director, a related matter is whether the petitioner established that it has a qualifying relationship with the foreign entity, In Quest of the Classics -- London.

The regulation at 8 C.F.R. § 214.2(1)(3) states in part 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 (1)(1)(ii)(G) of this section.

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section." A "subsidiary" is defined, in part, as a legal entity "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." A "branch" is defined as "an operating division or office of the same organization housed in a different location."

In the initial Form I-129 petition, the petitioner asserts that it owns 100% of the foreign entity as a "parent." In support of this assertion, the petitioner provided a letter dated May 21, 2005 describing the foreign entity as a subsidiary and stating that the petitioner owns 100% of the foreign entity. On July 9, 2005, the director requested additional evidence regarding the ownership and control of the foreign entity including articles of incorporation. In response, the petitioner provided a letter dated July 15, 2005 confirming that the petitioner "owns 100% of the shares of our London office." The petitioner did not offer any explanation as to why a copy of a stock certificate or articles of incorporation for the foreign entity could not be provided.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes

of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger and/or stock certificate registry and the articles of incorporation must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this case, the petitioner has failed to supply any evidence of ownership and control of the foreign entity. The petitioner did not even provide a copy of a stock certificate evidencing ownership of the foreign entity's issued shares. Without full disclosure, CIS is unable to determine the current ownership and control of the foreign entity.

Accordingly, the petitioner has not established that the petitioner and the foreign entity are qualifying organizations as required by 8 C.F.R. § 214.2(1)(3)(i), and the petition may also not be approved for this reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.