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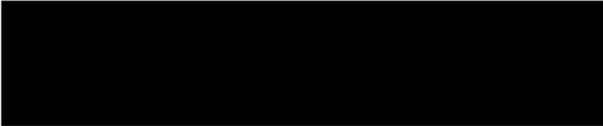
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
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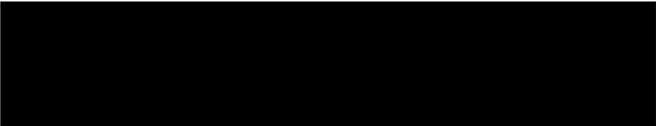


File: SRC 05 246 50930 Office: TEXAS SERVICE CENTER Date: **AUG 06 2007**

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, 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 visa petition seeking to extend the employment of its president/chief director of operations 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 limited liability company organized under the laws of the State of Tennessee and is allegedly engaged in the business of manufacturing and distributing dental instruments. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily 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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. In support of this assertion, the petitioner submits a brief and additional evidence.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

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

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an

assignment within an organization in which the employee primarily:

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

The petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner described the beneficiary's job duties in a letter dated September 9, 2005 appended to the initial petition as follows:

8am to 10am: 25% of weekly activities

Review if targets and objectives of the company have been achieved. Plan and solve problems on issues raised during company meetings. Focus on customer feedback, customer complaints and corrective actions taken.

10am to Noon: 25% of weekly activities

Attend meetings, and review data information as provided by wholesalers and dental associations. Develop U.S. network of casting and forging sources, and establish manufacturing structure to create semi-finished forgings.

1pm to 3pm: 25% of weekly activities

Review of pricing structure and media publicity. Supervise the marketing strategies for upcoming trade shows and marketing campaigns. Preside over meetings for the approval of any fixtures or equipment required for the company.

3pm to 5pm: 25% of weekly activities

Supervise the implementation of improvements on shipping and receiving departments.

Review vendors and service providers, and their roles in the progress of the company.
Review vendor performance records.

The petitioner also alleges in the letter that, in addition to the beneficiary, it currently employs an office manager and a warehousing assistant. The petitioner did not describe the duties of these two employees.

On September 26, 2005, the director requested additional evidence. The director requested, *inter alia*, payroll records, quarterly tax returns, an organizational chart for the United States entity, a list of the beneficiary's duties, and descriptions of the subordinate employees.

In response, the petitioner provided an organizational chart for the United States operation showing the beneficiary at the top of the organization supervising an office manager and a warehousing assistant. According to a document provided by the petitioner titled "Definitive Statement of U.S. Employment of [the beneficiary]" (the "Definitive Statement"), the office manager and the warehousing assistant began working for the petitioner on September 1, 2005. However, copies of the petitioner's Forms 941 and Tennessee Department of Labor and Workforce Development Premium Reports indicate that the petitioner only employed one person during July, August, and/or September 2005. The employee identified in the Tennessee Report is neither the "warehouse assistant" nor the "office manager" identified in the organizational chart and in the Definitive Statement. The petitioner offers no explanation for this inconsistency.

The petitioner also provided another job description in the Definitive Statement for the beneficiary which includes a breakdown of how much time the beneficiary devotes to each job duty. As this job description is in the record, it will not be reproduced here. While this job description is similar to the description provided in the letter dated September 9, 2005, the petitioner further described the beneficiary as establishing standards, policies, and procedures, and as optimizing the level of utilization of the company's assets. The breakdown of how the beneficiary uses his time in the Definitive Statement also differs from the breakdown provided in the letter dated September 9, 2005. In the Definitive Statement, the beneficiary is now described as spending 50% of his time reviewing targets and objectives; planning and solving problems; focusing on customer feedback; and establishing standards, policies, and procedures and as spending the remaining 50% of his time performing the remainder of his duties listed in the letter dated September 9, 2005 as well as optimizing the level of utilization of the company's assets.

Finally, the petitioner provided job descriptions for the "warehousing assistant" and the "office manager" in the Definitive Statement. These two alleged employees were described as performing clerical and administrative tasks necessary to the petitioner's business. The "office manager" is also described as having a university degree.

On March 6, 2006, 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, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. In support, counsel to the petitioner provided, *inter alia*, letters of support from Hamilton County, Tennessee; the Chattanooga Area Chamber of Commerce; and the Chattanooga-Hamilton County Business Development Center.

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

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 will be 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's description of the beneficiary's job duties has failed to establish that the beneficiary will act 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 will do on a day-to-day basis. For example, the petitioner states that the beneficiary will solve problems, attend meetings, and establish standards, policies, and procedures. However, the petitioner did not specifically define what types of problems will be solved, which meetings will be attended, and what standards, policies, and procedures will be established. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. 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). 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).

Moreover, many of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary focuses on "customer feedback" and "customer complaints;" reviews data provided by wholesalers and dental associations; will develop a network of casting and forging sources; and "supervises" marketing strategies for trade shows and campaigns. Such duties as generally and vaguely described constitute administrative or operational tasks when performed by the beneficiary. Moreover, as the petitioner does not employ a subordinate staff dedicated to relieving him of the need to perform the non-qualifying tasks inherent in the ascribed duties, it has not been established that he will be primarily employed as a manager for this additional reason. Therefore, it cannot be found that he will be "primarily" employed in a managerial capacity. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory or managerial employees. As explained in the organizational chart, the Definitive Statement, and the job descriptions for the subordinate employees, the beneficiary appears to manage a staff of two people who are engaged in operating the petitioner's business. While the petitioner has given one of the subordinate employees a lofty managerial title ("office manager"), the petitioner has not established that either of the employees is primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate employees appear to be engaged in performing tasks related to providing a service or producing a product, i.e., warehouse and clerical duties. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the 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 to perform the duties of the "office manager" or the "warehouse assistant."

Finally, as indicated above, the petitioner's payroll records for September 2005 fail to include the "office manager" and the "warehouse assistant" even though the petitioner asserts that these employees began working for it on September 1, 2005. The petitioner fails to explain this serious inconsistency. 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). Therefore, the petitioner has failed to credibly establish that the two subordinate employees were even

employed by the petitioner prior to the filing of the instant petition. Furthermore, 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).

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.¹

Similarly, the petitioner has failed to establish 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily employed as a first-line

¹While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. 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 credibly document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line manager of non-professional employees and is likely performing the non-qualifying tasks related to any such function. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

supervisor and/or is performing the tasks necessary to the provision of a service or the production of a product. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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).

The AAO notes that, on appeal, counsel provided letters of support for the petitioner from Hamilton County, Tennessee; the Chattanooga Area Chamber of Commerce; and the Chattanooga-Hamilton County Business Development Center. Counsel asserts on appeal that these letters constitute evidence that the beneficiary will be employed primarily in an executive or managerial capacity. While the AAO respects the effort put into writing these letters and understands the need to support new businesses which have been established in a given area, these letters of support are not probative of the nature of the beneficiary's job duties. As explained above, the beneficiary will not be deemed an executive or manager because of a job title or because he happens to direct the business as the owner or sole managerial employee. Moreover, as explained above, 8 C.F.R. § 214.2(l)(3)(v)(C) allowed the petitioner one year after the date of approval of the "new office" petition to expand to the point that it could support an executive or managerial position as defined by the Act. There is no provision that allows for an extension of this one-year period. As the business in this case does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner claims that the beneficiary is the sole owner of both the foreign employer and the petitioner. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had been employed abroad in a primarily managerial or executive position. 8 C.F.R. § 214.2(l)(3)(iv). 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 did abroad on a day-to-day basis. Broad statements such as "supervises the international operations," "manages administrative office," and "manages the production of the manufacturing plant" do not establish that the beneficiary actually performed managerial or executive duties. The fact that the beneficiary has given himself a managerial or executive title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary actually performed qualifying duties.

