

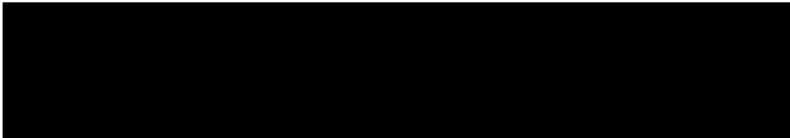
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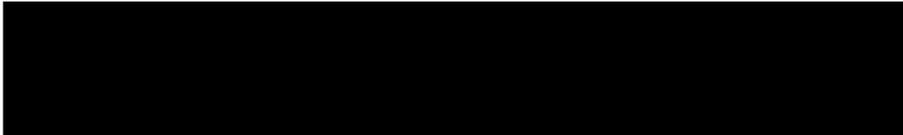
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File: WAC 05 053 51069 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner:  
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, 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 visa petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California and is allegedly a distributor and manufacturer of doors and windows. The petitioner claims that it is the subsidiary of Jinan Guangming Machine Co., Ltd. of China. 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 for three years.

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, 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 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 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. Given the ambiguity, the AAO will consider the appeal as if the petitioner is asserting that the beneficiary will be employed primarily as an executive *or* a manager.

In a letter dated December 7, 2004 appended to the initial I-129 petition, the petitioner describes the beneficiary's job duties as follows:

1. Negotiates with current clients, potential customers, and suppliers on goods that are in demand in US and Chinese market (30%);
2. Oversees the business operations and approves company operational policies (20%);
3. Plans and directs operations according to business plans and objectives based on the monthly financial analysis reports, and draws conclusion to determine the most profit feasible opportunity (20%);
4. Exercises discretionary authority in hiring and firing managerial employees in the departments under his supervision (20%);
5. Communicates and coordinates with the parent company to ensure personnel temporarily assigned to his duties in China is performing adequately. This may involve traveling back to the parent company periodically (10%).

The petitioner also provided wage reports indicating that the petitioner had three employees (the beneficiary, a vice president, and an accountant) at the end of the third quarter of 2004 and an organizational chart showing the beneficiary supervising the two other employees. The organizational chart also shows that there are several unfilled sales and technical positions.

On December 27, 2005, the director requested additional evidence. The director requested, *inter alia*, a detailed organizational chart, which includes job descriptions and reveals educational levels for the petitioner's other employees, and further descriptions of the beneficiary's duties, discretionary decisions, goals, and policies.

In response, the petitioner provided several examples of decisions made and actions taken by the beneficiary

during the petitioner's first year in operation. These included joint venture negotiations, establishing business objectives, leasing decisions, manufacturing and production decisions, hiring of staff, raw material acquisition, and setting advertising and marketing strategies. The petitioner also indicated in a letter dated March 15, 2005 that the vice president possesses a university degree, the accountant possesses a master's degree, and the petitioner replaced its accountant in late 2004. The specific degrees possessed by the subordinate employees, or their fields of study, were not disclosed in this letter.

On March 29, 2005, the director again requested additional evidence. The director requested, *inter alia*, more detailed job descriptions for the subordinate employees.

In response, the petitioner provided wage reports confirming that, as of the date of the petition's filing, the petitioner employed the beneficiary, an accountant, and a vice president. The petitioner also provided an updated organizational chart showing that the petitioner employs six people; however, the record reveals that only three of these people were employed at the time the petition was filed. Finally, the petitioner provided more detailed job descriptions for the two subordinate employees. The vice president, who holds a bachelor of arts degree, is described as follows:

Direct and develop director-level department heads in distribution (receiving, replenishment, order fulfillment, and returns processing), call center (customer care, order management, performance measurements, upsell and revenue enhancement programs), and information technology (operations systems, internal tech support, new technologies). This position will report directly to the President/CEO and will serve as a member of the executive team.

The accountant, who holds a master of arts degree, is described as follows:

Provide general ledger accounting, accounts payable, accounts receivable, fixed asset accounting and inter-company accounting support; Develop and maintain the policies that govern the Company's reporting process and ensure compliance with generally accepted reporting standards; Define the accounting system roadmap and system requirements of the future, and assist or direct system programming resources in the development of accounting systems; Plan and schedule work to meet datelines established by others to ensure completion of several related tasks; Use judgment on a variety of problems requiring deviation from standard practice.

On June 2, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, 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. Specifically, counsel asserts that the director should have considered all six of the petitioner's employees in reviewing the petition and that at least one of these employees, the technology manager, is a professional employee. Counsel makes these assertions even though he admits that the petitioner did not hire three of the six employees, including the technology manager, until after the petition was filed on December 15, 2004.

Upon review, petitioner's assertions are not persuasive. 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended

United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position as defined by law.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. 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 prove 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. When asked by the director to describe the beneficiary's day-to-day duties in his Request for Evidence, the petitioner simply restated the same job description in its letter dated March 15, 2005. Although the petitioner asserts that the beneficiary will direct operations and oversee the business, the petitioner fails to explain what these operations are and, equally important, who will perform the tasks related to these duties. Moreover, some of the beneficiary's duties described by the petitioner include operational or administrative tasks, such as negotiating with customers and suppliers, which will account for 30% of the beneficiary's time. Such duties are not managerial or executive in nature, and Citizenship and Immigration Services (CIS) cannot determine whether the beneficiary is primarily employed as a manager or executive absent a detailed breakdown of how much time the beneficiary will spend performing such non-qualifying tasks and a more detailed description of those duties which could be managerial in nature. 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). 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).

The petitioner also failed to prove that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or that he will manage an essential function within the organization. While the petitioner did supply an organizational chart, the job descriptions provided for the subordinate employees employed at the time the petition was filed, i.e., the vice president and the accountant, reveal that these employees are performing the tasks necessary to produce a product or to provide a service and have no supervisory or managerial functions. The beneficiary would therefore appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

On appeal, counsel to the petitioner asserts that the subordinate employees are professionals. However, the record fails to establish this for two reasons. First, the petitioner only employed two subordinate employees at the time the petition was filed, the vice president and the accountant. Counsel's reliance on the purported professional qualifications of the technical manager, who apparently was hired at some point after the filing of the petition, is not appropriate in these proceedings. 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).

Second, the job descriptions provided for the subordinate employees do not establish that the vice president or the accountant is a professional. 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 the subordinate employee. The possession of a bachelor's or a master'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 degree is actually necessary, for example, to perform the duties of the vice president or the accountant. Not only has the petitioner failed to reveal the fields of study leading to the degrees held by the subordinate employees, the petitioner has failed to provide sufficient details regarding the subordinate employees' duties, or the demands of the petitioner's business, for CIS to determine whether the positions require degrees. Therefore, the record does not prove that the beneficiary will be acting in a managerial capacity.<sup>1</sup>

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<sup>1</sup>While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless does not support this position. 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(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has

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 allegedly managing two employees who are apparently engaged in performing tasks necessary to produce a product or to provide a service, will be acting primarily in an 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 initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description, which includes operational and administrative tasks, fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. 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 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).