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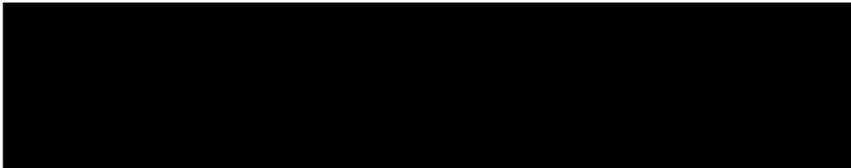
File: WAC 05 036 50357 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007

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 employ the beneficiary as 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 engaged in the wholesale of sporting goods and healthcare products. The petitioner claims a qualifying relationship with [REDACTED] of Taiwan.

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 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 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

either an executive *or* a manager.

The petitioner described the beneficiary's proposed duties, the duties of subordinate employees, and the petitioner's organization in documents appended to the initial petition. The petitioner described the beneficiary's duties as follows:

- Management. Decision maker of all policies. Strategy making & decision.
- Finance: Annual budget planning and control. All expenses monitoring.
- Personnel: Employee hire decision. Job and payment decision[.]
- eStore System: Design and establish whole eStore system and maintenance.
- Marketing: Product promotion decision. Marketing analysis. Advertisement.
- Import & Export: Product import control. Equipment & material export promote[.]
- Product Design: New product design. Appearance & packaging design.
- Product Technology. Engineering structure design. Technology support.
- Supervising: quality control; sales monitoring; shipping and delivery[.]

The petitioner provided a further description of these duties in a separate document appended to the initial petition, which also includes a breakdown of how much time the beneficiary will spend on each duty as follows:

- Company Management: 25%
 - Phone or online meeting with Taiwan parent company twice a month.
 - Company's policy design and analysis. Policy execution monitor and revise.
 - Company development strategy analysis, design and execution.
 - Overall business decision making. Management problems solving.
- Finance Control: 10%
 - Annual budget planning and all expenses control.
 - Daily sales income checking, bank account and credit balance checking.
- Personnel Planning: 3%
 - Company labor control. Job employ and payment decision.
 - Employee working efficiency monitoring. Employee entertainment leading.
- eStore System Design: 25%
 - Online eStore system design and establish. Currently 4 website running.
 - eStore trouble shooting, technical problem solving, antivirus control.
 - Website traffic increase promotion. Search engine listing up front promote.
 - Periodically website design improvement. Contents and price change.
 - New product line adding and new website establish every season.
 - Daily overall website checking and maintenance[.]
- Marketing and Sales: 20%
 - Marketing policy and strategy analysis, design and execution.

Product cost and sales expenses analysis. Product pricing decision.
Commercial advertisement and quotation papers design and order prints[.]
Major customers contact, meeting and sales. New customer promote.

Products Import & Parts Export: 5%
Product import quantity control. Place import orders. Wire payments.
Equipment & material export contract, purchase and monitoring.

Product Design and Technology Support: 2%
New product designs selection. Appearance & packaging design checking.
Product engineering structure design confirm. Technology support.

Product Line Development[:] 5%
New product line adding analysis and evaluation.
New product manufacturing planning or vendor contact and select.

Business Supervising: 5%
Quality control checking everyday. Customer sales monitoring everyday.
Shipping and delivery checking weekly. And other over all supervision.

The petitioner also provided two organizational charts (October 2004 and November 2004) for the United States operation. The more recent chart places the beneficiary at the very top of the organization directly supervising four people (an export manager, a shipping assistant, a CFO/secretary, and a sales manager). These subordinate employees, with the exception of the export manager, are shown to have supervisory functions. The charts show a total of twelve employees (including the beneficiary). However, the wage report for the third quarter of 2004 only reported six employees.

Finally, the petitioner provided "brief descriptions" of the employees directly supervised by the beneficiary including educational backgrounds and basic job duties.

On December 2, 2004, the director requested additional evidence. The director requested, *inter alia*, details regarding the employment of the CFO/secretary and a more detailed job description for the beneficiary. In response, counsel to the petitioner restated the same job description for the beneficiary as was previously provided and clarified that the CFO/secretary is not compensated by the petitioner.

On December 28, 2004, 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 or a 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). 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. For example, the petitioner states that the beneficiary's duties include policy design and execution, strategy development, and business decision-making. The petitioner did not, however, specifically define what policies, strategies, or decisions will be designed and executed upon, or, crucially, describe with specificity how the beneficiary will perform these duties. Equally important, the majority of the duties described, as broken down by the petitioner, are operational or administrative tasks that do not qualify as managerial duties. For example, running the company's website, marketing, balancing accounts, placing import orders, and designing products are not managerial or executive duties when the beneficiary performs the tasks necessary to these functions. 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 reveal that these employees are performing the tasks necessary to produce a product or to provide a service. Moreover, the vague job descriptions for the sales manager, export manager, and shipping manager fail to establish that these employees have supervisory or managerial duties. To the contrary, these employees appear engaged in performing operational or administrative tasks (i.e., marketing, product delivery, purchasing, product assembly, packaging). Finally, the petitioner admits that the CFO/secretary is not even an employee. In view of the above, the beneficiary would 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. Moreover, the job descriptions provided for the subordinate

employees do not establish that they are professionals.¹ Therefore, the record does not prove that the beneficiary will be acting in a managerial capacity.²

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

¹In 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 this matter, while some of the beneficiary's employees appear to hold university degrees, this is of no relevance absent evidence that the positions held by these employees require these degrees.

²While 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(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, which includes operational and administrative tasks and indicates that he will likely have first-line supervisor responsibilities, 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).

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 overseeing employees who are apparently engaged in providing services to customers and who is primarily engaged in performing administrative or operational tasks, 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(l)(3).

Beyond the decision of the director, a related issue in this proceeding is whether the petitioner has established that it and the foreign entity are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). A subsidiary is a firm, corporation, or other legal entity of which a parent owns more than half of the entity and controls the entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K). In this case, the petitioner asserts that it is 100% owned by the foreign entity thus, if true, establishing a parent/subsidiary relationship.

The regulation 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.

In support of its assertion of having a qualifying relationship, the petitioner provided corporate records, organizational documents, and three stock certificates issuing a total of 210,000 shares to the foreign entity. However, the petitioner also provided copies of its 2002 federal and California tax returns indicating that the beneficiary, and not the foreign entity, is the sole owner of the petitioner. In the Request for Evidence, the director requested that the petitioner submit documentation clarifying this inconsistency. In response, counsel to the petitioner indicated that petitioner's identification of the beneficiary as the owner of the petition was an "error" and that "the mistake is being amended." Counsel also provides copies of undated tax return amendments correcting the "error." There is no evidence in the record establishing that these amendments were filed before the director brought the discrepancy to the petitioner's attention or that the petitioner has taken any steps to similarly amend its California tax return. The petitioner also offers no explanation as to how or why this "error" was made.

Upon review, the petitioner has not satisfactorily resolved the inconsistency in the record and, consequently, has failed to establish that it has a qualifying relationship with the foreign entity. 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). In this matter, the petitioner has offered no objective evidence resolving the serious inconsistency regarding its ownership and control. Therefore, the petition may not be approved for this additional 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.