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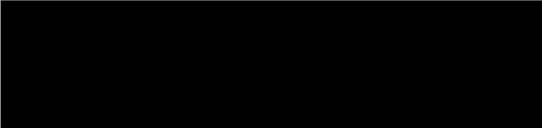
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: WAC 06 082 51156 Office: CALIFORNIA SERVICE CENTER Date: JAN 19 2007

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

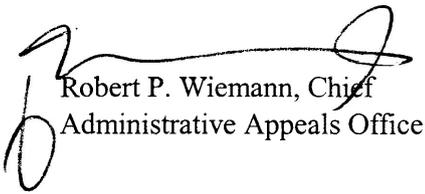
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 extend the employment of its manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, is engaged in the provision of Asian herbal medicine and treatment services. The petitioner states that it is a subsidiary of [REDACTED] Ltd., located in Seoul, Korea. The beneficiary was initially granted one year in L-1A status to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity with the United States entity.

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 for the petitioner disputes the director's decision and states that the beneficiary performs primarily managerial duties in the United States and is responsible for managing a subdivision of the petitioning company as the executive officer of the petitioner's Buena Park, California facility. Counsel submits a brief and additional evidence in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that 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 nonimmigrant petition was filed on January 18, 2006. The petitioner stated on Form I-129 that the beneficiary would serve as a "manager" with responsibility to "manage customer service and research and development." On the L classification supplement to Form I-129, the petitioner described the beneficiary's proposed duties as: "Analyze symptoms [sic] of patients to treat them and prescribe [sic] to them herbal medicine. Participate in operation of company with budgeting, planning and employee supervision." In an attachment to Form I-129, the petitioner stated that the beneficiary will: "Manage customer service and supervise employees. Research and develop herbal medicine for various types of ailments. Analyze symptoms of patients to treat patients and prescribe herbal medicine." The petitioner stated on Form I-129 that the beneficiary would work at the petitioner's Los Angeles, California location.

In a letter dated January 17, 2006, the petitioner described the beneficiary's duties as follows:

[The beneficiary] has been working as a manager of [the petitioner] since its inception. Her main responsibilities include treating and prescribing herbal medicine to patients, research and develop new or improved herbal medicine, make recommendations to other oriental medicine doctors as to the results of her research and new development, and participate in the operation of the business with budgeting, planning and supervision of employees. . . . For both the Parent and [the petitioner], [the beneficiary] has been instrumental in coming up with and implementing better and upgraded methodologies and products for treating patients, and consequently in instilling in the minds of patients and the general public positive images of them. Her contributions have been translated into growth and success of both companies. She also has supervised the staff assigned to research and development, and to customer service.

The petitioner also referenced the beneficiary's resume, on which she describes her current role as follows:

Doctor of Oriental Medicine

Gather data and information of patient symptoms and analyze them to treat and prescribe to patients herbal medicine. Provide consultation to patients as to general health issues. Participate in operation of company with respect to budgeting, planning and employee supervision.

The petitioner also submitted evidence that the beneficiary is licensed to practice acupuncture in the State of California.

The petitioner provided an organizational chart for the U.S. company, on which the beneficiary is identified as one of three oriental medicine physicians working at the petitioner's Los Angeles, California clinic, and as the sole employee of the petitioner's Buena Park, California clinic. The petitioner stated in its supporting letter that its Buena Park location was currently preparing for "next year's opening." The organizational chart does not depict any employees subordinate to the company's clinic physicians.

On an attached employee list, the petitioner provided the names, job titles and educational qualifications for all eleven of its employees. The beneficiary is identified as one of four oriental physicians, and the other employees include an executive vice president/chief financial officer, a clinic manager, an assistant manager, a pharmacy manager, and three clerks. The petitioner indicated that its clinic oriental physicians are responsible for "practicing oriental medicine, consulting and treating patients and prescribing herbal medicine to them." According to the employee list and accompanying job descriptions, the petitioner's clinics also employ clerks, who are supervised by a clinic manager.

The petitioner provided copies of its California Form DE-6, Quarterly Wage and Withholding Report for the fourth quarter of 2005, which confirmed the employment of twelve workers as of December 31, 2005. The AAO observes that the beneficiary's monthly salary of \$3,500 is comparable to that paid to the other three employees identified as "oriental physicians" on the petitioner's organizational chart and employee list.

The director denied the petition on January 26, 2006, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the position description provided indicated that the beneficiary will perform non-managerial customer service duties, rather than working in a primarily managerial or executive capacity. The director further noted that although the petitioner indicated that the beneficiary will supervise employees, the petitioner's organizational chart shows the beneficiary at the bottom of the company's organizational chart and indicates no subordinate employees beneath her. Thus, the director concluded that the beneficiary will not supervise professional employees. The director further determined that the beneficiary would not be primarily managing the organization, or a department, subdivision, function or component of the organization, but, rather, would be directly providing the petitioner's services.

On appeal, counsel for the petitioner asserts that the beneficiary has been functioning in a managerial capacity as defined by the regulations in that she supervises other professionals, manages the company's Buena Park subdivision, and manages the essential function of providing oriental medicine services to patients. Counsel states that the beneficiary's primary responsibilities are "management of customer service and supervision of

employees," "research and development of new or improved herbal medicine," "make recommendations to other oriental medicine physicians employed by [the petitioner] as to the results of her research," and "participate in the operation of the business with budgeting and planning." Counsel asserts that the beneficiary's responsibilities were fully described in her resume and in the petition itself, but notes that the beneficiary's responsibility for the operation of the company's Buena Park subdivision "was not fully explained in the petition."

Counsel contends that the director erroneously determined that the beneficiary will not supervise professional employees. Counsel emphasizes that the organizational charts show that the management of the U.S. operations, including the office and clinics, is the responsibility of the "local management team" and emphasizes that the beneficiary was transferred to the United States from the foreign entity as part of this team in 2005. Counsel states that the petitioner's organizational chart shows that the beneficiary has sole responsibility for the petitioner's Buena Park, California subdivision, and asserts that the beneficiary is in fact the chief executive officer, chief financial officer and secretary of the subdivision, which is operated by "[REDACTED] Inc." Counsel states that the beneficiary "has the authority to exercise discretion over the day-to-day operation of the entity, to hire and fire personnel to be employed at the Buena Park subdivision, and she is responsible for supervision over other oriental medicine physicians at the Buena Park subdivision." Counsel further indicates that the beneficiary also budgets and plans for the division, and that, while she also treats and prescribes herbal medicine to patients, this responsibility requires only 30 percent of her time and is not her primary responsibility.

Counsel disputes the director's determination that the beneficiary will perform customer service duties, emphasizing that the petitioner stated that the beneficiary will "manage customer service and supervise employees." Counsel states that management of customer service within the petitioner's organization "inevitably involves the management and supervision of oriental medicine physicians who are professionals." Counsel asserts that the beneficiary "plans and coordinates schedules of oriental medicine physicians, determines which physicians must attend to which patient, supervises over what herbal medicine is being prescribed to patients, and regularly evaluates performance of the oriental medicine physicians and pharmacists." Counsel contends that the beneficiary manages the essential function of providing oriental medicine services to patients and "does not just primarily perform tasks necessary to provide services."

Finally, counsel asserts that the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(B) does not preclude the beneficiary from performing the services of the company, provided that her duties are primarily of a managerial or executive nature. Counsel therefore contends that the fact that the beneficiary also treats and prescribes herbal medicine to patients must not be a factor in denying the petition. Counsel asserts that the beneficiary's "practice of oriental medicine sets an example of high quality service and leads to the promotion of morale of other medicine doctors."

In support of the appeal, the petitioner submits a statement of information for [REDACTED] Inc.," filed with the California Secretary of State on September 1, 2005, which identifies the beneficiary as the chief executive officer, secretary, chief financial officer and sole director of the company. The petitioner also submits an action by unanimous written consent of the board of directors of the petitioner, dated June 5, 2005, in which the directors stated that a new company has been organized to expand its operations to Buena Park,

California, and elected the beneficiary to "operate the new company" and to serve as its president/CEO, secretary and chief financial officer.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.*

Here, the petitioner claims that the beneficiary will be employed in a managerial capacity. However, as noted by the director, the evidence submitted in support of the petition indicated that the beneficiary would primarily perform the services of the organization, rather than performing managerial duties. The petitioner stated in its January 17, 2006 letter that the beneficiary's "main responsibilities include treating and prescribing herbal medicine to patients, research and develop new or improved herbal medicine." The petitioner did not clarify why providing medical services or research and development tasks should be considered managerial duties consistent with the definition at section 101(a)(44)(A) of the Act. Although the petitioner indicated on Form I-129 that the beneficiary is employed as a "manager," the company's employee list and organizational chart identify the beneficiary as an oriental medicine physician who is responsible for consulting and treating patients and prescribing medicine. 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). The AAO notes that no other duties are attributed to the petitioner's physicians, and the petitioner made no distinction between the duties performed by the beneficiary and those performed by the three other physicians on the employee list.

Although the petitioner and counsel reference the beneficiary's resume as supportive of her employment in a managerial capacity, the beneficiary's resume indicates that her job title is "Doctor of Oriental Medicine," and that her duties including gathering data and information of patient symptoms, providing consultation with respect to general health issues, and treating and prescribing herbal medicine to patients. Overall, the petitioner's statements, the employee list, the organizational chart, and the beneficiary's resume indicate that the beneficiary's primary duties are to provide the petitioner's patients with medical diagnosis and treatment services, not to manage the organization or a subdivision of the organization, other professional, supervisory or managerial employees, or an essential function of the organization. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO acknowledges the petitioner's statements on Form I-129 that the beneficiary would "manage customer service and research and development," and that the beneficiary will "participate in" budgeting, planning and employee supervision." While these statements suggest that the beneficiary may perform some

managerial duties, the petitioner failed to substantiate its claim that the beneficiary would actually supervise employees engaged in providing customer service or performing research and development activities, and in fact stated that the beneficiary would be directly treating patients and researching and developing new products. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As noted by the director, the petitioner's organizational chart indicates that the beneficiary is one of three physicians employed at the company's Los Angeles, California clinic, and there is no evidence that she would supervise the other physicians or the other clinic employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The beneficiary's role in budgeting and planning has not been explained, however, it is evident from the record that these duties, even if managerial in nature, are not among the beneficiary's primary responsibilities.

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

While counsel correctly states that performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. In the present matter, as discussed above, the majority of the beneficiary's tasks do not fall directly under traditional managerial duties as defined in the statute.

Counsel's arguments on appeal are based on new claims that the beneficiary devotes the majority of her time to managing the company's "Buena Park subdivision," as its chief executive officer. Counsel provides no explanation as to why the petitioner neglected to mention the beneficiary's management of this subdivision at the time the petition was filed. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Furthermore, the petitioner specifically stated in its January 17, 2006 letter that its Buena Park office was not yet operational and that the company was currently performing "interior work for next year's opening." Even if the beneficiary will eventually operate the office, the petitioner must establish eligibility as of the date of

filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp., supra.* Further, the petitioner has not provided evidence that the company that will operate the Buena Vista office, "[REDACTED] Inc." is a qualifying organization for the purposes of this visa application, although the record suggests that it may be a subsidiary of the petitioning company. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Regardless, as there is no evidence that the petitioner's Buena Park, California office was staffed or operational as of the date of filing the petition, the beneficiary's prospective duties with the new location need not and will not be considered. Since the majority of counsel's arguments on appeal focus on the beneficiary's authority to manage the operations and employees of this new office, the petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary's primary duties as of the date of filing were providing medical services to the petitioner's clients as an oriental medicine physician based at the petitioner's Los Angeles, California clinic. Counsel's claim that the beneficiary devotes only 30 percent of her time to treating patients is not supported by evidence in the record, and appears to be dependent upon counsel's unsupported assertion that the beneficiary manages other physicians within the Buena Park clinic. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As discussed above, there is no evidence that the beneficiary was involved in the supervision of other employees as of the date of filing the petition.

Counsel claims on appeal that the beneficiary manages the essential function of "providing oriental medicine services to patients." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As discussed above, the petitioner's supporting letter, employee list and accompanying job descriptions, and organizational chart, along with the beneficiary's resume, indicate that the beneficiary is employed primarily to provide consultation and treatment services to clients, rather than directly or indirectly managing the provision of services. The petitioner has not distinguished the beneficiary's duties from those of the company's other oriental medicine physicians

employed at the same location, or established that she performs at a senior level within the petitioner's organization with respect to this function.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.