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**U.S. Citizenship  
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Services**

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File: SRC 06 014 53214 Office: TEXAS SERVICE CENTER Date:

**JUL 03 2007**

IN RE: Petitioner:

Beneficiary:



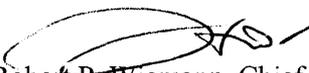
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 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 Florida and is allegedly an information service provider. The beneficiary was initially granted a one-year period of stay to open a new office in the United States (SRC 01 232 50319). This petition was subsequently extended from August 2, 2002 until August 2, 2004 (SRC 02 236 50302). The petitioner did not seek to extend this petition prior to its expiration. The instant petition was filed on October 19, 2005 and has been characterized as a petition for new employment.<sup>1</sup>

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 by (1) failing to consider the petitioner's evidence regarding the beneficiary's supervision of managerial and professional staff members; (2) wrongly determining that the beneficiary was responsible for the day-to-day operation of the United States operation; and (3) failing to defer to two earlier petition approvals for the beneficiary when there has been no material change in the beneficiary's job duties.

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.

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<sup>1</sup>It is noted that, according to counsel, the petitioner chose not to file a petition seeking an extension of the previously approved petition because, prior to its expiration, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary. However, this petition was denied on August 5, 2005. While the petitioner's failure to seek a petition extension and to seek an extension of stay may have an effect on the beneficiary's eligibility for the extension of stay now requested in the instant petition, the AAO will limit its review of the director's decision to whether the petitioner has established that the beneficiary is eligible for classification as an intracompany transferee employed in an executive or managerial capacity. There is no appeal from a denial of an extension of stay. 8 C.F.R. § 214.1(c)(5).

- (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 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. While the petitioner repeatedly refers to the beneficiary as an "executive" in both the initial petition and in the appeal, the petitioner does not clearly state that it is seeking to classify the beneficiary as being employed primarily in an executive capacity. Moreover, counsel specifically refers to the beneficiary's "supervision of managerial and professional staff" on the Form I-290B. Given the ambiguity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed as either an executive *or* a manager and will consider both classifications.

The petitioner described the beneficiary's job duties in a letter dated September 28, 2005 appended to the initial petition as follows:

[The petitioner] seek[s] to transfer [the beneficiary] to the U.S. operation, [the petitioner,] to continue the temporary position of President. ***As such, [the beneficiary] would implement policies and procedures. He would direct the policies, management and guidelines of our U.S., Mexico, Brazil and Venezuela operations, according to the guidelines of our parent company.*** He would expand our business clientele and business strategies. He would be responsible for overseeing all business activities including, marketing and sales strategies of our international offices. [The beneficiary] would be the senior level person in the U.S. organizing, expanding, directing, and developing the business. He would control all operations and strategic management activities in the **United States, Brazil, Mexico and Venezuela.** These include relating to a wide variety of management tasks, including financial tasks, which must be all auditable, predictable and consistent. He would direct the expense control of the company, including outsourcing services, personnel evaluation, hiring and firing.

[The beneficiary's] duties would be restricted to purely executive and managerial functions. He would oversee and supervise the functions of over 10 employees in the U.S.[,] Brazil, Venezuela and Mexico offices. Also, [the beneficiary] will oversee 12 employees from the operations and sales department from the Argentina office whom will directly report to him.

The petitioner also submitted an organizational chart for the United States operation. The chart identifies the beneficiary as the president and portrays him as supervising three employees in the United States engaged in sales and operations. The chart also portrays the beneficiary as supervising a variety of other staff members in five other countries. While the petitioner's federal and Florida wage reports from the second quarter of 2005 confirm that the petitioner employs three people, one of these employees is apparently the beneficiary. Moreover, the wage report indicates that the third employee was not hired until June 2005. Therefore, the petitioner apparently employed the beneficiary and one other person in April and May 2005 and the beneficiary and two other persons beginning in June 2005. The petition was filed on October 19, 2005.

On October 25, 2005, the director requested additional evidence. The director requested, *inter alia*, job descriptions and educational background information for the subordinate employees, a list of the beneficiary's duties, and a breakdown of the percentage of time the beneficiary devotes to each duty.

In response, counsel to the petitioner provided a list of duties for the beneficiary and a breakdown of how many hours each week are devoted to each duty, as follows:

#	Description of Duties	Time allotment
1	Detect new business opportunities for the company such new partners/markets or alliances	5.0
2	Detect new partners and/or resellers for [the petitioner], and constant coordination with current ones. (e.g., Burson-Marsteller – Fleishman-Hillard).	4.0
3	Interface with partner companies such as PRNewswire, Biz360 and Delahaye, as well as Public Relations and Advertising firms to ensure excellent business relations.	5.0
4	Spot comparable services and/or competitors to develop new service and sale policies	5.0
5	Detect possible prospects and negotiate new clients with local and international VIP accounts. (e.g., FedEx – Oracle – IBM – Discovery Channel).	3.0
6	Periodic supervision of regional office (Brazil – México – Venezuela – Argentina)	3.5
7	Approve the marketing and pricing strategies for all international clients to market service contracts and sale of products.	3.5
8	Executive administrative tasks concerning: Cash-Flow – Current Accounts – Credit Lines – etc.	3.0
9	Attend and be part of seminars, talks and forums.	2.0
10	[R]esearch and follow up of [sic] new technological tools (software and hardware) that allow us to have an edge and compete with global services.	2.5
11	Oversee and general supervision of Miami office and staff.	3.5

The petitioner also provided a description of five subordinate employees. However, only the "account executive" and the "assistant/receptionist" actually appear on the Florida wage report roster submitted with the initial petition. The "account executive" is described as being engaged in sales and telemarketing. The record contains evidence indicating that the "account executive" has earned a foreign university degree. The

"assistant/receptionist" is described as being engaged in performing operational and clerical tasks.

On January 4, 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, counsel asserts that the director erred by failing to consider the petitioner's evidence regarding the beneficiary's supervision of managerial and professional staff members, by wrongly determining that the beneficiary was responsible for the day-to-day operation of the United States operation, and by failing to defer to two earlier petition approvals for the beneficiary when there has been no material change in the beneficiary's job duties.

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'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 establish that the beneficiary will be performing managerial or executive duties in the United States. To the contrary, many of the duties ascribed to the beneficiary appear to be non-qualifying operational or administrative tasks which do not rise to the level of being managerial or executive in nature. For example, most of the beneficiary's duties are related to marketing the petitioner's services or customer relations (17 out of 40 hours), spotting competitors and comparable services (5 out of 40 hours), and acting as a first-line manager of the Miami office (3.5 hours out of 40 hours), see *infra*. These duties are not managerial or executive in nature and, as these make up a majority of the beneficiary's duties, it has not been established that he will be primarily employed as an executive or manager. 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).

Equally important, the petitioner and its counsel place significant emphasis on the beneficiary's role in managing not only the Miami office, but also the offices in Brazil, Mexico and Venezuela, and, according to the organizational chart, the offices in Argentina and Spain. However, other than the identification of 3.5 hours per week being devoted to the "periodic supervision" of the foreign offices, the record is devoid of any explanation as to what percentage of the beneficiary's other duties actually pertains to the foreign offices. For example, 3.5 hours are set aside for approving "the marketing and pricing strategies for all international clients to market service contracts and sale of products." However, the petitioner does not explain to what extent this duty pertains to the foreign offices, if any. This is vitally important because the beneficiary's rendering of services, even managerial or executive services, to foreign operations may not be used to qualify the beneficiary as an intracompany transferee under the Act. "Intracompany transferee" is defined as one who seeks to enter the United States temporarily in order to render his or her services to a qualifying organization

in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(A). Absent a complete and credible explanation regarding the beneficiary's duties in the United States vis-à-vis the foreign offices, it cannot be confirmed that the beneficiary is primarily employed in a managerial or executive capacity. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. As explained in the organizational chart, wage reports, and job descriptions for the subordinate employees, the beneficiary appears to manage a university educated "account executive" engaged in sales and telemarketing and an "assistant/receptionist" engaged in performing operational and clerical tasks. No supervisory or management duties have been ascribed to these two subordinate employees. To the contrary, these employees appear to be performing the tasks necessary to produce a product or to provide a service. Moreover, the other staff members do not appear to be employed by the United States operation despite the petitioner's assertions to the contrary because, as indicated above, they are not listed on the wage reports. Given that the petitioner employs only two subordinate staff members, it does not appear that the petitioner employs a subordinate staff capable of relieving the beneficiary of the need to primarily perform those non-qualifying administrative or operational tasks inherent to the management of a small business. 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. Section 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.<sup>2</sup> For these reasons, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>3</sup>

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<sup>2</sup>In evaluating whether the beneficiary will manage 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 a 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 any of the beneficiary's alleged subordinate staff members.

<sup>3</sup>While the petitioner has not clearly argued that the beneficiary will manage an essential function of the

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 indicates that he will be primarily performing non-qualifying administrative or operational tasks. Moreover, as explained above, the beneficiary will be employed as a first-line supervisor and will be rendering services to branch offices outside of the United States. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for Citizenship and Immigration Services (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).

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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 will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties will be managerial functions, if any, and what proportion will be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line manager of non-professional employees, will likely perform non-qualifying administrative and operational tasks, and will provide services to branch offices outside of the United States. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties in the United States, the AAO cannot determine what proportion of his duties will 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).

