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U.S. Citizenship
and Immigration
Services

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File: WAC 05 800 44232 Office: CALIFORNIA SERVICE CENTER Date: **JUL 06 2007**

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

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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 for a period of five years as its art director 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 Arizona and is allegedly a publishing business. The petitioner claims a qualifying relationship with a branch office in Lebanon.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States, or has been employed abroad, 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, and has been, employed primarily as a 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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial 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.

The petitioner described the beneficiary's proposed managerial duties in a letter dated March 29, 2005 appended to the initial petition as follows:

[The beneficiary] will handle all company's accounts pertaining to Arabic design and publishing including but not limited to art direction, managing team of designer and reporting to higher management. [The beneficiary] will be operating in a managerial position to ensure utilizing all his skills and knowledge for the company.

As our Managing Art Director, [the beneficiary] will have overall responsibility for effectively leading and managing new business development, strategic growth, and marketing direction. Responsibilities include:

- Applying creative skills in communication media to existing and newly acquired clients.
- Successfully develop and execute strategy initiatives to fulfill the company's growth and revenue goals.
- Work with our partners to develop and validate the company's revenue and financial projections and assumptions.
- Determine client fee/compensation structure and core client mix.
- Determine if existing relationships may lead to immediate business opportunities, and

- attempt to bring these clients into the company.
- Determine overall new business strategy.
- Finalize and outline services to be provided.
- Identify key company competitors and competitive advantages.
- Determine ideal target company prospect and assemble new business hit list of prospective companies.
- Determine optimal methods for promoting the company, including marketing materials needed.
- Continue to be involved with key Middle Eastern marketing conferences and initiatives to maintain credibility as an industry expert.
- Facilitate business growth, change and team spirit through motivating, coaching, delegating to and training employees.

On June 6, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary will manage other supervisory, managerial, or professional employees, or will manage an essential function within the organization; an organizational chart for the United States operation describing the petitioner's staffing levels; and wage reports for the petitioner's employees.

In response, the petitioner provided an organizational chart portraying the beneficiary as supervising an "assistant art director" who, in turn, is portrayed as supervising a "graphic designer." Both of the subordinate employees are shown to have two-year degrees in graphic design, and both are described as being engaged in providing graphic design services to clients. The petitioner also provided a letter dated August 22, 2005 indicating that, since many of the "people involved in [the petitioner's] projects are working on an independent contractor basis," they are not listed in the wage reports but are identified in another document titled "Transaction Detail by Account." Because the "assistant art director" and the "graphic designer" are not listed in the wage reports, but do appear in the "Transaction Detail by Account," it appears that the two subordinate staff members are independent contractors hired by the petitioner to work on certain projects.

On September 21, 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, counsel to the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary will be employed primarily as 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. In this matter, the petitioner and its counsel have consistently claimed that the beneficiary will be employed primarily in a managerial capacity and, as such, the AAO's analysis will initially be limited to the petitioner's eligibility for this classification.

The petitioner has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include developing "strategy initiatives" and determining "new business strategy." The petitioner did not, however, specifically define what strategies will be developed and determined. 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).

Moreover, the petitioner did not specifically explain how much time the beneficiary will devote to the various duties listed in the job description. This is particularly important in this matter because many of the duties ascribed to the beneficiary do not appear to be managerial in nature. To the contrary, many of the duties appear to be related to marketing, or are operational in nature, and would not rise to the level of managerial duties. For example, duties such as identifying key company competitors, assembling business hit list, formulating company promotion methods, involvement in marketing conferences, and determining ideal target company prospects are not managerial in nature when the functions inherent to these duties are performed by the beneficiary. Not only does the petitioner fail to specifically define what the beneficiary must do to perform these duties, the petitioner does not appear to employ a subordinate staff which could relieve the beneficiary of performing the functions inherent to these duties. The record indicates that the petitioner employed two people in the quarter in which the instant petition was filed, and the only independent contractors described by the petitioner are engaged in providing services to clients. Therefore, the petitioner has not established that the beneficiary is "primarily" employed in a managerial capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also failed to establish 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 two subordinate staff members indicate that they are performing the tasks necessary to produce a product or to provide a service, e.g., providing graphic design services to clients. While the petitioner describes the "assistant art director" as having supervisory authority over the graphic designer, the record fails to establish that this staff member is truly a supervisory or managerial employee. Not only does the job description for the "assistant art director" fail to establish that he is primarily engaged in supervising the graphic designer rather than primarily providing graphic design services himself, it is simply not credible that an independent contractor, a graphic designer, would be hired by the petitioner to primarily supervise the work of one other independent contractor who is also a graphic designer. Therefore, 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 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 staff members do not establish that they are professionals.¹

Finally, even if the "assistant art director" and the "graphic designer" were established to be supervisory, managerial, or professional positions, the beneficiary's supervision of independent contractors is a non-qualifying duty. While the supervision and use of independent contractors in certain circumstances could establish that a manager or executive is being relieved of the need to perform non-qualifying functions, the supervision of independent contractors alone is not a qualifying duty under the regulations. Title 8 C.F.R. § 214.2(1)(1)(ii)(B) clearly states that a manager must supervise and control the work of *employees*.²

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial

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). In this case, the petitioner has indicated that both of the subordinate staff members have two-year degrees. Therefore, it has not been established that they are professionals.

²Also, the petitioner has not established that the beneficiary will manage an essential function of the organization. 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 not provided evidence that the beneficiary will manage 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 will be 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).

capacity as required by 8 C.F.R. § 214.2(1)(3).³

The second issue in the present matter is whether the beneficiary has been employed by the overseas entity in a primarily managerial capacity.

As the petitioner failed to specifically describe the beneficiary's duties abroad, the director requested additional evidence on June 6, 2005. The director requested, *inter alia*, an organizational chart for the foreign employer and a detailed description of the beneficiary's job duties.

In response, the petitioner described the beneficiary's job duties in a statement titled "Art Director Duties in Lebanon." As this statement is in the record, the entire job description will not be repeated here. Generally, the petitioner described the beneficiary as having three sets of duties abroad: (1) creative duties; (2) primary responsibilities; and (3) managerial duties. The job description does not reveal how much time the beneficiary devotes to each set of duties.

The petitioner also provided an organizational chart portraying the beneficiary as supervising one graphic designer. His subordinate employee is described as having a two-year degree in graphic design.

On September 21, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary has been employed abroad in a primarily managerial capacity.

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

As explained above, 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(1)(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 and its counsel consistently assert that the beneficiary has been employed abroad in a managerial capacity and, as such, the AAO's analysis will initially be limited to the petitioner's eligibility for this classification.

³It is noted that the director determined that the petitioner failed to satisfactorily explain the employment status of the two subordinate staff members. Upon review, the AAO disagrees and hereby withdraws the director's comments regarding the petitioner's failure to provide copies of wage reports related to these independent contractors. The record adequately establishes that these staff members are not employees, that wage reports do not exist for the independent contractors, and that these staff members are employed on a project specific basis. The petitioner adequately and consistently explained this arrangement, and the AAO does not find that this explanation undermines the credibility of the petition. That being said, the petitioner has nevertheless failed to establish that the beneficiary will be employed primarily in a managerial capacity, and the petition may not be approved for that reason.

The petitioner has failed to establish that the beneficiary has been acting in a "managerial" capacity for the foreign employer. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's "managerial duties" that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner is described as establishing goals and objectives. However, the petitioner never reveals what goals and objectives are being developed. 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. 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.*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41.

Moreover, most of the tasks ascribed to the beneficiary are non-qualifying administrative or operational tasks and do not rise to the level of managerial or executive duties. For example, the functions of designing brochures and advertisements, and developing layouts, are not managerial in nature. Importantly, the petitioner did not reveal how much time the beneficiary devotes to the "creative duties" and the "primary responsibilities," which dominate the job description, and how much time he devotes to the vaguely described "managerial duties." Further, since the record indicates that the beneficiary only has one subordinate employee, it has not been established that a subordinate staff is available to relieve the beneficiary of the need to perform the non-qualifying tasks inherent in his duties. Absent a specific and credible explanation of his managerial duties, it cannot be determined that the beneficiary has been "primarily" employed abroad in a managerial capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner also failed to establish that the beneficiary has been supervising and controlling the work of other supervisory, professional, or managerial employees, or that he has been managing an essential function within the organization. While the petitioner did supply an organizational chart, the job description for the beneficiary's single subordinate employee indicates that this graphic designer, who has a two-year degree, is performing the tasks necessary to provide a service or produce a product. Therefore, the petitioner has not established that the graphic designer is a supervisory, professional, or managerial employee. The beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the record does not prove that the beneficiary has been acting in a managerial capacity.⁴

⁴While the petitioner has not specifically alleged that the beneficiary manages an essential function overseas, the record would not support this assertion. The petitioner's vague job description, which includes operational and administrative tasks and indicates that he likely has at most first-line supervisor responsibilities, fails to document what proportion of the beneficiary's duties are managerial functions and what proportion are 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 are managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA*

Beyond the decision of the director, an additional issue is whether the petitioner has established that the beneficiary has been or will be employed 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 has been or will be acting primarily in an executive capacity. As explained above, the beneficiary appears to be employed as a first-line supervisor and performs chiefly non-qualifying operational tasks. Therefore, the petitioner has not established that the beneficiary will be or has been employed primarily in an executive capacity.

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.