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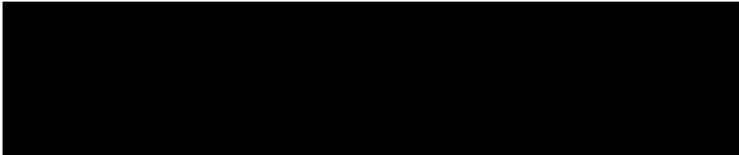
FILE: SRC 05 071 50314 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



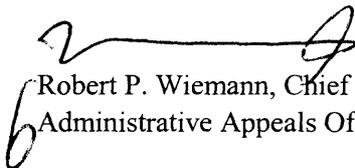
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner states that it is engaged in the manufacturing and sale of display monitors and deflection yokes for TV and computer displays. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its assistant manager/sales engineer, pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The director denied the petition, concluding that the petitioner has not demonstrated that the beneficiary has been employed abroad, or would be employed in the United States, in a primarily managerial or executive capacity. The director noted that in the foreign entity, the beneficiary appears to have been a first-line supervisor of four employees who are not professionals and, as such, cannot be considered to be employed in a managerial or executive capacity as required under 8 C.F.R. § 214.2(l). The director further noted that the record indicates that the beneficiary would not have any employees reporting directly to him in the U.S. entity, and that he primarily performs the tasks necessary to produce a product or to provide services.

Counsel submitted a brief and a letter from the petitioner along with the Form I-290B, Notice of Appeal. In the brief, counsel asserted that the director's "decision is erroneous as it disregarded that the [beneficiary's] proposed services are in a capacity that involves specialized knowledge with respect to his employer under Section 1101(a)(15)(L) of the Immigration and Nationality Act." Counsel's brief includes a section entitled "managerial capacity," in which counsel merely restates verbatim the discussion of the beneficiary's position and job duties from the petitioner's support letter that was submitted initially with the Form I-129. Counsel does not address any aspects of the director's decision regarding the beneficiary's managerial or executive capacity.¹

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

At the outset, the AAO notes that the regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The AAO finds that on appeal, counsel in this matter has failed to identify specifically any erroneous conclusion of law or statement of fact in the director's decision. First, counsel's assertion that the director

¹ Counsel also submits (1) a letter from the petitioner, which also repeats the same discussion of the beneficiary's management capacity from the initial support letter; (2) a summary of the beneficiary's employment history, and (3) copies of the organizational charts of the two entities, which were previously submitted.

erred in disregarding the issue of whether the beneficiary would be employed in a specialized knowledge capacity is irrelevant to this petition. The petitioner has explicitly indicated on the Form I-129, Petition for a Non-Immigrant Worker, that it was requesting L-1A classification for the beneficiary. All supporting documentation in the record appears to support a request for L-1A classification, in connection with employment of the beneficiary in the United States in a managerial or executive capacity. Nowhere in the record is there any mention of a request for L-1B classification, in connection with employment in the United States in a specialized knowledge capacity. Second, as noted earlier, the section in counsel's brief that purports to address the beneficiary's managerial capacity is no more than a verbatim restatement of the beneficiary's job description that was already in the record. Counsel fails to identify specifically any erroneous conclusion of law or statement of fact in connection with the director's decision on that issue.

Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed. C.F.R. § 103.3(a)(1)(v).

The AAO notes for the record that it concurs with the director's conclusion that the petitioner has failed to demonstrate eligibility for the benefit sought. However, the AAO finds it would be appropriate to elaborate upon the grounds for denying the petition, as follows.

The director found that the petitioner has failed to demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, since the beneficiary would not have any employees reporting directly to him in the U.S. entity. However, the AAO notes that the director has not addressed in her decision the issue of whether the beneficiary qualifies as a "function manager," since that appears to be the petitioner's claim with respect to the beneficiary's position with the U.S. entity.

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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In an undated letter accompanying the initial petition, the petitioner stated that as the sales engineering manager, the beneficiary would be responsible for sales engineering activities for the U.S. entity's multimedia division. The petitioner claimed that sales engineering is an essential function of the company and defined the function as follows:

Sales engineering is the function of developing new products and technologies for sale to customers. In high-tech industries, there is a symbiotic relationship between manufacturers of products and their component suppliers. New products are sometimes the fruit of the technological innovation by suppliers of components and at other times are the ideas of the

manufacturers, which are made possible through working with suppliers to develop the components which will enable [a] new idea to develop into a functioning product. Sales engineering is the function through which the exchange of ideas and technological innovations are utilized to create new products.

The petitioner claimed that sales engineering is an essential function because the company's market share will decrease if it does not keep current with technology and market demands. The petitioner described the beneficiary's day-to-day duties required for sales engineering as follows:

1. Collect and analyze technical information regarding the display monitor market and new markets.
2. Collect and analyze technical information regarding the new technologies, components, and raw materials currently available or in development with potential for display monitor application.
3. Prepare reports and proposals for the Design & Development Department of the Multimedia Division in Japan for use in the research and development of new products and product applications.
4. Coordinate with current and potential customers regarding new products, new technologies, and the potential for joint development of display monitor technologies and products.
5. Provide technical assistance and guidance to sales engineers.

Based on the description provided by the petitioner, it would appear that the "sales engineering" function largely involves sales and marketing research in connection with the company's products and services. While it is reasonable to categorize this function as an "essential function" for the business, the description of the beneficiary's day-to-day duties do not show that the beneficiary would manage the function, but rather, that he would be performing the duties relating to the function, such as collecting and analyzing technical and market information, preparing reports, and liaising with customers. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. As such, the record does not establish that the beneficiary would be managing an essential function in the U.S. company. Since he also would not be supervising the work of other employees, the record does not support the conclusion that he would be employed in the U.S. entity in a primarily managerial capacity.

As the director concluded, the record also does not sufficiently demonstrate that the beneficiary was employed abroad in a managerial or executive capacity.

In the letter accompanying the Form I-129, the petitioner stated the beneficiary's title in the foreign entity is "Supervisor of Sales Department of Intelligent Devices and Solutions Division" and indicated that he performs essentially the same duties that he would perform in his proposed employment with the U.S. entity. In a request for further evidence (RFE) issued on January 27, 2005, the director requested, among other things, a definitive statement describing the foreign employment of the beneficiary, including position title, duties, percentage of time spent on each duty, and number of subordinates reporting directly to the beneficiary with a description of their titles, duties and educational background. In response to the RFE, the petitioner submitted a document entitled "Job Description of the Beneficiary in Japan," stating:

[The beneficiary] entered [the foreign entity] in April 1997, and [was] assigned to sales representative of OEM products which are industrial display monitors and display monitors for office computers. Currently, [the beneficiary] is Supervisor of Sales Dept. of Intelligent Devices and Solutions Div., and engaged in sales of LCD display monitors for medical use (hereinafter "Medical Imaging Display") for customers of healthcare industries.

[The beneficiary] has been in charge of sales in a wide range of industries, which were PC industry, consumer electronic industry, measuring instrument industry and so forth. . . .

In time of starting Medical Imaging Display business, [the beneficiary] showed his great ability as sales representative. . . .

With respect to the percentage of time spent on each of the beneficiary's duties, the petitioner simply stated that the beneficiary "spends 100% of his time managing the Sales Department that include[s] PC industry, consumer electronics industry and measuring instrument industry." The petitioner submitted an organizational chart showing the beneficiary as a supervisor of "4 persons" in the sales department. Above the beneficiary is a manager, who in turn is under the supervision of the general manager of the sales department. Although the petitioner claims that the beneficiary has "4 subordinate managers," the petitioner states the title of three of these individuals as "Japan Domestic Sales" and one as "Sales Assistant." No job description is provided for any of the beneficiary's subordinates.

The information set forth in the petitioner's initial support letter regarding the beneficiary's job in Japan and the job description provided in response to the RFE do not appear to describe the same job. If, as the petitioner initially stated, the beneficiary's duties in his job in Japan are "essentially the same" as those he would perform in the United States, then he would be directly involved in market research and analysis. However, in response to the RFE, the beneficiary is described variously as a "sales representative," "engaged in sales" and "in charge of sales." 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).

Moreover, the director's request for a breakdown of the beneficiary's duties garners only a general response that the beneficiary spends "100% of his time managing the Sales Department that include[s] PC industry, consumer electronics industry and measuring instrument industry." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner's brief responses failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Moreover, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Here, the AAO concurs with the director's

assessment that based on the evidence, the beneficiary appears to be a first-line supervisor of four employees in the foreign entity who are not professionals and, as such, cannot be considered to be employed in the foreign entity in a managerial or executive capacity. Although the petitioner sought to characterize the beneficiary's subordinates as "managers," the organizational chart of the foreign company does not show that these persons supervise or manages any other employees, nor was there any job description provided to show that their job duties could be considered managerial or supervisory in nature. Similarly, without any job descriptions, it cannot be determined whether their positions require advanced degrees such that they could be deemed professionals. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary was primarily supervising a staff of non-professional employees in the foreign entity, the beneficiary cannot be deemed to have been primarily acting in a managerial capacity.

Based on the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary was employed in the foreign entity, and would be employed in the U.S. entity, in a primarily managerial or executive capacity. Regardless, inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed pursuant to C.F.R. § 103.3(a)(1)(v).

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. The petitioner has not met this burden.

ORDER: The appeal is summarily dismissed.