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**U.S. Citizenship  
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File: WAC 02 208 53761 Office: CALIFORNIA SERVICE CENTER Date: **JUL 27 2007**

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

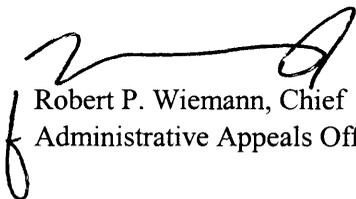
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa, and the petitioner filed an appeal with the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the decision for further consideration. The Director again denied the petition, and the matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner seeks to extend the temporary employment of the beneficiary as its vice president in the United States 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 U.S. petitioner, a corporation organized in the State of California, claims to be engaged in furniture sales, and claims to be the subsidiary of Shanghai Arts and Crafts Import and Export Corporation, located in Shanghai, China. The beneficiary has been employed by the petitioner in L-1A status since September 1998, and the petitioner now seeks to extend the beneficiary's stay.

On November 19, 2002, the director denied the petition concluding that the petitioner did not establish that the beneficiary had been employed abroad within the three years immediately preceding the filing of the petition. The petitioner appealed to the AAO, which withdrew the director's decision and remanded the petition for a review of the record and further consideration. On July 29, 2004, the director again denied the petition on the basis that the petitioner had failed to demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The matter is once again before the AAO on appeal. On appeal, counsel for the petitioner asserts that the beneficiary was in fact qualified for the benefit sought, and in support of this contention a brief and additional evidence is submitted.

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 issue in this 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.

In a letter dated May 30, 2002, the petitioner provided the following list of the beneficiary's duties:

1. Formulates and administers specific organization policies and develops long-range goals and objectives in accordance with board directives and corporation charter.

2. Confers with President and other chief administrative personnel to review achievements and discuss required changes in goals or objectives resulting from current status and conditions.
3. Coordinates functions and directs operations among divisions and departments and establishes responsibilities and procedures for attaining objectives.
4. Supervises and evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives.
5. Reviews analysis of activities, financial statements, operations, and forecast data to determine company progress toward stated goals and objectives.
6. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and increase sales revenues.
7. Plans and develops industrial, labor and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public.
8. Oversees overall business operations of [the petitioner], especially import and export affairs, marketing and sales activities.
9. Coordinates [the petitioner's] business operations with the overseas parent company.

An organizational chart for the petitioner further indicated that the U.S. entity had two vice presidents. The beneficiary, as vice president, oversaw the sales and marketing and the import and export department. The chart indicates that there were a total of ten employees in these two departments, including the beneficiary, who was identified as manager of the marketing and sales department. The other vice president oversaw the office and the development/sales department, which had a total of three employees. Both the beneficiary and the other vice president answered to the president of the petitioner.

On March 25, 2004, the director requested additional evidence. The director requested an organizational chart with additional details, including the position titles and duration of employment of all other employees of the petitioner. In addition, the director requested a more detailed list of duties of the beneficiary.

Counsel for the petitioner submitted a response dated May 20, 2004. The petitioner resubmitted the previously-submitted list of duties for the beneficiary, but included an overview of the percentage of time the beneficiary devoted to each duty. Specifically, counsel stated:

[The beneficiary] allocated his time primarily on the job of managerial and executive capacity. He spent 25% of his time for listening [sic] to reports from managers of subordinating departments by calling meetings for first hand materials and information; 25% for analyzing information and statistics on the market trend and other important matters; 25% for formulating policies, plans, programs and standard, rules and disciplines for the corporation[;] 10% for coordinating with other departments and reporting to the higher management and parent company[;] 5% for traveling to other locations to represent the company for either strategic meetings or important negotiations; 5% for going to business associations representing the company; [and] 5% for handling emergency situation[s].

In addition, the petitioner supplemented the organizational chart by providing the educational backgrounds and annual salaries of all other employees. Also provided was a brief description of the duties of these employees, with clarification on their position titles and a brief discussion of the duties of each person in each department. For instance, the petitioner explained that the Marketing and Sales department employed four persons; namely, a senior account executive, an account executive, an inspector, and a customer service representative. The Import and Export department employed a department manager, who in turn oversaw three subordinate employees, whose general responsibilities were to receive imported goods, set inventory, distribute goods to various regions and customers, transport goods by air, and sea, maintain inventory, and perform special repairs as needed. Additionally, the petitioner acknowledged the Office of the corporation, which consisted of a manager and a subordinate book keeper, as well as the Department of Development, which employed a manager with no subordinates. Finally, the petitioner explained that the beneficiary oversaw all of these departments, and therefore was employed in a qualifying capacity.

On July 29, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the director's decision was erroneous, and submits a brief and additional evidence in support of his contentions. Counsel asserts that the beneficiary directs four departments, three managers, and twelve employees, and that he controls the essential function of marketing and sales.

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 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). The AAO notes that while counsel specifically alleges that the beneficiary is employed primarily in a managerial capacity, consideration will be given under both regulatory definitions.

The description of duties provided, both in the initial letter of support and in response to the request for evidence, simply adopt many of the key phrases used in the regulatory definitions of managerial and executive capacity. General statements such as "formulates specific policies" and "implements directives from the board" do little to clarify the exact nature of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). 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 has 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. at 1108.

Despite the director's request for additional evidence in support of the contention that the beneficiary functions in a primarily managerial or executive capacity, the petitioner, through counsel, submitted an equally vague job description which did little to clarify the beneficiary's role in the company. For instance, this vague description also raised questions regarding the exact nature of the beneficiary's supervision of subordinate departments, for it claimed that the beneficiary managed all departments of the petitioner when it previously claimed that he was devoted to the oversight of the marketing and sales department. The petitioner was given an opportunity to supplement the record with additional details regarding the beneficiary's duties, but failed and/or refused to do so. Instead, the petitioner elected to contradict previous statements regarding the beneficiary's position, thereby leading to questions regarding the credibility of the petitioner's claims. 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).

Upon review of the evidence submitted, it appears that the petitioner is relying on the beneficiary's oversight of the marketing and sales department, as well as the import and export departments, as evidence of the beneficiary's managerial capacity. 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.

In response to the request for evidence, the petitioner supplemented the original organizational chart by inserting a very brief description of each employee's position within the organizational hierarchy, and a brief overview of the role each employee played in their designated department as set forth in the May 20, 2004 letter. The organizational chart itself also contained a statement regarding the level of education each employee had received. This information is important, because on review, it appears that the account executive in sales and marketing and the inspector each possess bachelor's degrees, whereas the rest of the employees have either a high school education or up to two years of college. These claims, however, shed little light on the overall structure and organizational hierarchy of the petitioner. First, in evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by 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, for example, to perform the work of the account executive and the inspector. In fact, the description of their duties is so vague that it is impossible to determine the exact nature of their positions.

The only additional documentation addressing the subordinate employees is the brief overview of the petitioner's departments as set forth in the May 20, 2004 response to the request for evidence. By virtue of the brief position descriptions provided therein, it cannot be deemed that these employees are professional, supervisory, or managerial in nature. Although the organizational structure suggests that each of these employees are supervised by the beneficiary, there is no definitive evidence in the record that these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although each department allegedly has a "manager," there is no definitive evidence that a dedicated person supervises a subordinate staff, particularly when the petitioner simultaneously claims that the beneficiary is the supervisor of all employees. Furthermore, the claim that the two allegedly managerial employees who possess bachelor's degrees, but earn an annual salary of just \$13,000 per year, suggests that these employees are not professional *or* managerial employees.<sup>1</sup> If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Thus, the petitioner has not established that these employees require bachelor's degrees, such that they could be classified as professionals. Furthermore, no independent evidence to corroborate these claims has been submitted. Finally, the organizational chart contains no additional evidence that the remaining employees under the beneficiary's supervision oversee a specific department of supervise subordinate employees, such that they could be classified as managerial or supervisory. 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 Obaigbena*, 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). 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)).

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<sup>1</sup> Considering that the minimum wage in the State of California during the year 2004 was \$6.75 per hour, an annual salary of \$13,000 per year would suggest that (1) these employees were only part-time employees; or (2) they were not earning minimum wage for their alleged managerial positions. *See* U.S. Department of Labor, Employment Standards Administration Wage and Hour Division, "Changes in Basic Minimum Wages in Non-Farm Employment under State Law: Selected Years 1968 to 2006," available at <http://www.dol.gov/esa/programs/whd/state/stateMinWageHis.htm> (accessed on May 1, 2007). Again, without additional documentation regarding this issue, the AAO is precluded from drawing definitive conclusions. Nevertheless, this additional discrepancy in the record raises additional questions regarding the totality of the petitioner's claims. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Although the petitioner submitted a list of the beneficiary's duties with a percentage breakdown of the time he devoted to each, the descriptions themselves are vague and fail to specifically articulate the role of the beneficiary on a day-to-day basis. Furthermore, the petitioner claims that the beneficiary oversees a subordinate staff of managerial and/or professional employees, and is thus qualified for an extension of the petition because he is relieved from performing non-qualifying duties. The ultimate fact, however, is that the record contains insufficient evidence to support this claim. The brief description of the beneficiary's duties on the employee list generally claim that he is responsible for the sales and marketing of the company. However, it should be noted that the original organizational chart submitted indicated only one sales employee in that department, whose position was later delegated as "account executive." Furthermore, the organizational chart indicated that the beneficiary's duties included "focusing on sales order[s] and purchasing order[s]." Clearly, this is a task critical to the petitioner's continued success; however, this duty is not traditionally considered managerial or executive in nature, and the AAO notes that there are no purchasing employees identified in the record.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In this case, however, the petitioner has been in business since 1991, and there is no reasonable explanation provided for the beneficiary's performance of such non-qualifying duties. 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).

Based on the evidence presented, the petitioner has not established that the beneficiary will be employed in the United States in a predominantly 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.