



U.S. Citizenship
and Immigration
Services

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File: SRC 06 108 52346 Office: TEXAS SERVICE CENTER Date: MAY 01 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 extend the employment of its president and general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Florida and is allegedly engaged in the business of real estate management, consulting, and investment services. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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 and that the beneficiary's duties are primarily those of an executive or manager. In support of the appeal, counsel submits a brief.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In a letter dated February 15, 2006, the petitioner described its organization, the beneficiary's job duties, and the job duties of the petitioner's two additional employees. As this letter is in the record, the contents of the letter will not be repeated here. The letter generally describes the beneficiary as supervising two employees in his operation of the petitioner's business operation.

On February 27, 2006, the director requested additional evidence. The director requested a current organizational chart for the petitioner, listing the petitioner's employees, job titles, job descriptions, and educational backgrounds; a copy of the petitioner's tax returns; Forms 1098 and Forms 1099 for any contractors; and evidence that the petitioner is currently doing business.

In response, counsel to the petitioner submitted a letter dated March 31, 2006, which contains an organizational chart. This chart shows the beneficiary supervising a "business development manager" and an "office manager." It also identifies the petitioner's counsel, a tax preparer, and a company called [REDACTED] which allegedly "handles the technical work" of the petitioner's real estate projects, as contractors.

The March 31, 2006 letter describes the job duties of the beneficiary, the business development manager, and the office manager as follows:

[The beneficiary] oversees business works that [are] currently being handled for U.S. Clients, and partners in the U.S. He is responsible for planning, developing and establishing policies and objectives in accordance with the corporate charter. He supervises and directs the activities of subordinate managers and personnel. He coordinates the functions and operations between the foreign company and the U.S. subsidiary. He directs all marketing,

sales, and fiscal policies. He supervises the compilation of financial data and the reporting of the same[.] He executes contracts on behalf of the company and ensures that operations are conducted efficiently. He plans and direct[s] public relations policies designed to improve the company's image and the relationship with clients, and he formulates sales goals and policies, coordinating and supervising activities for the petitioner's offices here in Florida. He formulates sales goals and policies, coordinating and supervising activities. He develops primary goals, operating plans, policies, and short and long range objectives for the organization; implements business plans and strategies following Board of Directors' approval; Direct and Coordinate activities to achieve profit and return on capital; Establish organizational structure and delegate authority to subordinates, Lead the organization towards objectives, meet with and advis[e] other executives and review results of business operations; Determine action plans to meet organizational goals; Represent organization to financial community, major customers, government agencies, shareholders and the public[.] The beneficiary started working on March 2005, more than 40 hours a week, he devoted 100% of his time to managerial and executive tasks.

[The business development manager]: Under the beneficiary's management, [the business development manager] has secured important contacts, keeps and maintains clients and support database; organize markets research campaigns and identified new customer. Provide high-level administrative support to the General Manager and Business Administrators; perform a variety of key support functions, addressing inquiries of current and potential customers, develop spreadsheets to improve and inform quality and customer care initiatives of the company. Assisting potential clients to meet their needs, preparing and negotiating contracts, supervising that all the conditions and interests of the parties involved are understood and completely discloses, constant communication with Attorneys, Realtors, Banks, Management Companies, Inspectors, Mortgage Brokers, Title Closing Agents, Engineers, Surveyors, Appraisers, Etc.

Educational Background: Equivalent of a Bachelor's Degree in Business Administration with a major in Human Resources.

[The office manager]: Her job consists of supporting the managerial efforts by the beneficiary in order to avoid his involvement in day to day activities; performs a variety of key support functions, addressing inquiries of current and potential customers, communicating with associates department regarding sales. Develops spreadsheets to improve and inform quality and customer care initiatives. Prepares meeting agendas and carefully monitor all action items; Coordinates and directs support services, manages services that allow the company to operate efficiently. Analyzes and proposes ways to improve the company's structure, efficiency, and profits of the company. Keep and maintain clients and support database; organize markets research campaigns and identified new customer; prepare agendas and carefully monitor all appointments.

Educational Background: U.S. Equivalent of Bachelor's Degree[.]

Reports directly to the beneficiary[.]

Finally, counsel to the petitioner described the petitioner's business activities in the letter dated March 31,

2006. While counsel described many of the petitioner's business goals, it appears that the petitioner's sole current business activity is its operation of a restaurant called "[REDACTED]" located in Miami, Florida.

On April 18, 2006, the director denied the petition. The director concluded 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. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager.

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

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 will be primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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 demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary works with "U.S. clients;" plans, develops, and establishes policies and objectives; coordinates functions and operations; directs marketing and sales; plans public relations and sales policies; and develops "primary goals, operating plans, policies, and short and long range objectives for the organization." However, the petitioner fails to specifically describe its "clients," or to define what services the petitioner is providing to them, and fails to define with any specificity the plans, policies, objectives, functions, operations, or goals which the beneficiary will develop or plans to develop. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary is actually performing managerial duties. 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).

Moreover, the record does not persuasively establish that the beneficiary will primarily perform managerial duties. As explained above, the petitioner's only current business operation appears to be the operation of a restaurant. The petitioner provides virtually no information regarding the staffing and operation of this restaurant, and none of the petitioner's two subordinate employees or independent contractors are described as being specifically involved with its operation. Therefore, as the record is devoid of any evidence that there is a subordinate staff available to relieve the beneficiary of the need to perform the non-qualifying administrative or operational tasks related to the restaurant business, it must be concluded that the beneficiary will perform these tasks, and it cannot be confirmed that the beneficiary will primarily perform managerial 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. Based on the organizational chart and vague job descriptions for the subordinate staff members, the beneficiary appears to supervise a staff of two employees. However, the petitioner has not established that the two employees are primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees are performing the tasks necessary to produce a product or to provide a service, i.e., working with clients and administering the 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Also, while the petitioner asserts that the beneficiary manages independent contractors, i.e., a tax preparer, the petitioner's counsel, and a third party company, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that a managerial employee must manage *employees* in order to be classified as a manager for purposes of this visa classification. Independent contractors are not employees. See 26 C.F.R. § 31.3121(d)-1(c)(2). Finally, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

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

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

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).

It is noted that the petitioner asserts that the two subordinate employees possess the "equivalent" to United States university degrees. However, the petitioner does not describe the source of these degrees nor does it submit any evidence establishing that these degrees are equivalent to United States degrees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Regardless, in this matter, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree or equivalent by a subordinate employee does not automatically lead to the conclusion that the 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 either of the subordinate employees.

²While the petitioner has not argued that the beneficiary manages an essential function of the 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 manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line manager of non-professional employees and/or is engaged in performing non-qualifying operational or administrative tasks. 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 is 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).

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 is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary appears to be primarily employed as a first-line supervisor and is performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has not established that it still has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner, a corporation, asserts that it is 100% owned by the beneficiary's foreign employer. In support of this claim, the petitioner submitted corporate organizational documents and a stock certificate purporting to issue 1,000 shares of stock to the foreign entity.

On February 27, 2006, the director requested additional evidence including "a copy of the U.S. entity's income tax return for the prior year."

In response, the petitioner submitted as "Exhibit VI" a copy of its 2005 Form 1120, U.S. Corporation Income Tax Return. The Form 1120, however, does not include page 3 of the return, although it does include pages 2 and 4. Similarly, the 2005 Form 1120 submitted as part of "Exhibit VIII" is also missing page 3. Page 3 of the 2005 Form 1120 is particularly relevant because Schedule K appears on this page. Schedule K requires the filer to make several representations regarding its ownership and control including whether it has foreign owners owning more than 25% of its voting stock, whether anyone owns more than 50% of its voting stock, and whether the petitioner is a subsidiary. Because the petitioner has chosen to not submit page 3 of its Form 1120, it has precluded further inquiry into its ownership and control. 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).

