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U.S. Citizenship  
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Services

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FILE: SRC 06 104 51082 Office: TEXAS SERVICE CENTER Date: MAY 02 2007

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

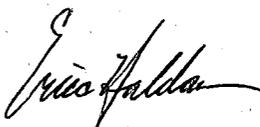
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 dismissed.

The petitioner, a Texas corporation, claims that it is a multinational investment company. The petitioner states that it is a wholly-owned subsidiary of [REDACTED] Ltd., located in China. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president for a two-year period.

The director denied the petition on June 28, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

Counsel for the petitioner filed a timely appeal on July 31, 2006. On appeal, counsel for the petitioner states that the director's decision is erroneous since it is based solely on the size of the U.S. company. Counsel contends that the Service cannot look at the company's size alone but must also take into account the reasonable needs of the organization. Counsel also states that CIS must consider the beneficiary's duties in light of the overall stage of development of the U.S. company. In addition, counsel states that the U.S. company is "still in the initial stage of development." Finally, counsel for the petitioner asserts that the beneficiary is employed by the petitioner in a primarily executive capacity. Counsel submits a brief in support of the appeal.

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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 nonimmigrant petition was filed on February 13, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of president for the petitioner, which claimed to have two employees. In a support letter dated February 6, 2006, the U.S. entity's goals and the beneficiary's proposed duties in the U.S. are described as the following:

[The U.S. entity] was established in Texas to assist [the foreign company] to market its products in the U.S. and invest in the U.S. The company is responsible for the following:

1. Establish business ties with the U.S. wholesalers, manufacturers, and retailers.
2. Seek investment opportunities for [the foreign company].
3. Assist [the foreign company] to purchase construction equipment and raw materials from U.S. concerns.
4. Study US market for products produced by [the foreign company's] subsidiary and affiliated companies.
5. Establish market for [the foreign company's] products in the United States.

As the President of [the U.S. entity], [the beneficiary] will be responsible for the following specific duties:

1. Evaluate, review, and implement the business goals of [the foreign company].

2. Director [sic] overall management of [the U.S. entity].
3. Establish the goals and policies of [the U.S. entity]/
4. Set up the U.S. operation.
5. Exercise wide latitude in discretionary decision making of the company.
6. Confer with U.S. firms and industrial representative.
7. Coordinate and direct research and purchase of construction equipment and manufacturing technology in the U.S.
8. Implement policies to promote and market [the foreign company's] products.

The petitioner also submitted the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2005. The tax returns indicate that the U.S. company employed one individual for the first quarter of 2005, and two individuals during the last three quarters of 2005. In addition, the petitioner submitted Forms W-2 for 2005 issued to the beneficiary and one additional employee, and pay stub information for these employees.

On April 14, 2006, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) an organizational chart for the U.S. company, including the names, job titles and a detailed job description for each employee; (2) a more specific description of the day-to-day duties performed by the beneficiary, including the percentage of time spent on each duty; (3) information as to which employee does the shipping and handling at the U.S. entity; and, (4) copies of Forms 1098 and 1099 if the U.S. entity utilizes any contract employees.

In a response to the director's request, dated June 22, 2006, the petitioner submitted the same job description as previously submitted, however, included the percentage of time the beneficiary will spend on each duty. The description is as follows:

1. Evaluate, review, and implement the business goals of [the foreign company]. (5%)
2. Director [sic] overall management of [the U.S. entity] on day to day basis. (40%)
3. Establish the goals and policies of [the U.S. entity]. (5%)
4. Set up the U.S. operation. (5%)
5. Exercise wide latitude in discretionary decision making of the company in the running of the company business. (5%)
6. Confer with U.S. firms and industrial representative. (20%)
7. Research and coordinate purchase of construction equipment and manufacturing technology in the U.S. (10%).
8. Implement policies to promote and market [the foreign company's] products. (10%)

In addition, the petitioner submitted an organizational chart of the U.S. entity. The chart indicated the beneficiary as the president who supervises one assistant supervisor of the business division, who in turn supervises two clerks. The chart also lists the job descriptions of the assistant supervisor and the two clerks. The duties performed by the assistant supervisor of the business division are described as:

Participate in the development and coordination of business projects; Assist in strategic planning, business analysis, project development and accounting/budgeting; Provide functional and administrative coordination to ensure effective and timely implementation

business deals; Examine and evaluate project management process for continuing implements; Set up and maintain computerized accounting system; Handle AP, AR, and GL adjusting by preparing and analyzing Financial Statements, and Expense Analysis Report.

The chart also stated the job description for the two clerks as the following:

Perform assigned store duties that include, but limited to: Stocking, cleaning, shipping & handling, truck loading/unloading, inventory management, customer service, etc.; Responsible for the inventory management and appearance of the warehouses; Recap the inventory and report it to the Supervisor.

The petitioner stated that the two clerks are contract employees, and submitted copies of their IRS Forms 1099-MISC, for 2005. In addition, the petitioner stated that the two clerks are in charge of the shipping and handling of the U.S. entity. The petitioner noted that the company operates as an importer, wholesaler and retailer of auto parts and accessories.

The director denied the petition on June 28, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that the petitioner employs two contract workers, but the petitioner did not submit evidence to document the amount of time the contract employees devote to the U.S. entity. The director also noted that since the U.S. entity employs one additional employee and two contract workers, it appears that the beneficiary would be engaged in the day-to-day business activities of the U.S. entity.

On appeal, counsel for the petitioner states that the director's decision is erroneous since it is based solely on the size of the U.S. company. Counsel contends that CIS cannot look at the company's size alone but must also take into account the reasonable needs of the organization. Counsel also states that the Service must consider the beneficiary's duties in light of the overall stage of development of the U.S. company. In addition, counsel states that the U.S. company is "still in the initial stage of development." Finally, counsel for the petitioner asserts that the beneficiary is employed by the petitioner in a primarily executive capacity.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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 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 petitioner has consistently claimed that the beneficiary will be employed in an executive capacity, however, based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his proposed duties considered in light of the totality of the record, suggests that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as the beneficiary will "evaluate, review, and implement the business goals of [the foreign company]"; "director [sic] overall management of [the U.S. entity] on day to day basis"; "establish the goals and policies of [the U.S. entity];" "exercise wide latitude in discretionary decision making of the company in the running of the company business. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Furthermore, these duties merely paraphrase the statutory definition of "executive capacity." 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. *Id.*

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will "set up the U.S. operation" and "confer with U.S. firms and industrial representative." Since the petitioner has not explained that the U.S. company has hired any employees in marketing or financial development, it appears that the beneficiary will be providing the services of finance and market research and operations rather than directing such activities through subordinate employees. Again, based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-executive administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States. The petitioner did not submit the requested job description as requested by the director. Instead, the petitioner reiterated the job duties described in the original job description. 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has two employees. In addition, in response to the director's request for evidence, the petitioner submitted Form 1099 for two contract employees utilized by the U.S. entity. Although the petitioner has established that the U.S. entity has contractual employees in the areas of inventory, warehouse and maintenance services, the petitioner has not documented whether these individuals are employed full-time or part-time for the U.S. entity. Additionally, as discussed further below, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's wholesale and retail business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

On appeal, counsel contends that CIS must take into account that the U.S. company was in an early stage of development, and therefore the staffing level may be fewer in the set-up stages of the company. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, for the reasons discussed herein, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel correctly observes that a company's size alone, may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner at the end of the first year of operations to determine whether it can support a managerial or executive position. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). Again, there is no provision in CIS regulations that allows for an extension of this one-year period.

Furthermore, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner was operating as an importer, wholesaler and retailer of auto parts and accessories with a gross annual income of \$180,000. The U.S. company employed the beneficiary as president, one assistant supervisor of the business division and two independent contractors who were employed as clerks. In reviewing the brief job descriptions of the employees at the U.S. entity, submitted by the petitioner in response to the director's request for evidence, it appears that the beneficiary and the assistant supervisor are engaged in the operational and administrative tasks in running the business. However, it appears that the assistant supervisor spends most of his or her time dealing with the

administrative and finance tasks of the company. Based on the evidence submitted, it appears that the beneficiary will be performing many of the various operational tasks inherent in operating the business on a daily basis, such as acquiring products, negotiating contracts, researching the market, and selling the petitioner's products. Based on the record of proceeding, the beneficiary's job duties include a number of non-qualifying duties that would reasonably preclude him from functioning in a primarily managerial or executive role. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the president and one assistant supervisor and two clerks. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary is employed in a managerial capacity based on his supervisory duties, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The record establishes that the beneficiary will supervise an assistant supervisor and two clerks.

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 subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the administrative and clerical functions of the subordinates supervised by the beneficiary.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is executive in 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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.* A managerial or executive 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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary supervises one assistant supervisor and two clerks, the U.S. company has not established a complex organizational structure which would elevate the beneficiary beyond a first-line supervisor. In the instant matter, the petitioner has not established evidence that the beneficiary is employed in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. It is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although these employees need not be professionals. Here, the petitioner has not met this burden.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.