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U.S. Citizenship
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Services

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File: WAC 06 133 50613 Office: CALIFORNIA SERVICE CENTER Date: NOV 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:

SELF-REPRESENTED

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation allegedly engaged in the software development business. The petitioner seeks to employ the beneficiary as its office 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 director denied the petition concluding that the petitioner failed to establish (1) that it has secured sufficient physical premises to house the new office; or (2) that the petitioner and the foreign employer have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner offers additional evidence regarding its business operations.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a "new office," the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

A threshold issue in this matter is whether the petitioner is a "new office" for purposes of 8 C.F.R. § 214.2(l)(3).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In this matter, the petitioner asserts that it was established on August 2, 2004, that it has three employees, and that it generated over \$290,000.00 in revenue from April 2005 to March 2006. The petitioner also indicated in the L Classification Supplement to Form I-129 that the beneficiary is *not* coming to the United States to open a new office. Finally, the petitioner submitted an income statement, 2004 tax return, and other

documents indicating that the petitioner commenced doing business in 2004. The instant petition was filed on April 21, 2006.

In view of the above, the record as a whole indicates that the petitioner had been doing business for over one year when the petition was filed, and thus it does not meet the definition of a "new office." Therefore, to the extent the director treated the petitioner as a "new office," the decision is withdrawn. However, as the maintenance of a place of business is nevertheless relevant to whether the petitioner has established that it is "doing business" as defined by the regulations, the director's consideration of this criteria shall not be disturbed.

Therefore, the primary issue in this matter is whether the petitioner has established that it and the foreign employer are qualifying organizations.

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

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.

Title 8 C.F.R. § 214.2(l)(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." 8 C.F.R. § 214.2(l)(1)(ii)(K). An "affiliate" is defined in part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(J). A "joint venture" is generally defined as a "business undertaking by two or more persons engaged in a single defined project." *Black's Law Dictionary* 843 (7th Ed., West 1999). Finally, "doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the petitioner, a corporation, asserts in the Form I-129 that it is a "joint venture" of the foreign employer and that the "[c]ompany stock ownership and managerial control of each company" is 40%. The petitioner also submitted a translation of the foreign employer's articles of association which indicates that the foreign employer, [REDACTED], is 80% owned by [REDACTED]. Finally, the petitioner submitted a letter dated March 7, 2006 in which the petitioner asserts that the foreign employer has "the same ownership as the California based Movell Software, Inc."

On May 11, 2006, the director requested additional evidence. The director requested, *inter alia*, additional evidence establishing ownership and control of the foreign employer; evidence addressing the acquisition of the petitioner's stock; copies of corporate minutes, copies of the petitioner's articles of incorporation; copies of the petitioner's stock certificates and stock ledger; and a detailed list of the owners of the petitioner.

In response, the petitioner submitted a list of owners of the foreign employer indicating that [REDACTED] owns a 26.7% interest. The petitioner also submitted a resolution dated December 20, 2005 indicating that [REDACTED] owns a 60% interest in the petitioner. Finally, the petitioner submitted a copy of its 2004

Form 1120 which indicates that no individual or corporation owned 50% or more of the corporation's voting stock. The petitioner did not submit a copy of any stock certificates, its stock ledger, or evidence addressing the acquisition of the petitioner's stock.

On October 31, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

On appeal, the petitioner asserts that it is a qualifying organization. In support, the petitioner submits additional evidence, including a copy of a stock certificate.

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

The 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). In this matter, the petitioner failed to submit a copy of its stock certificates, stock ledger, and evidence addressing the acquisition of the petitioner's stock, even though this evidence was specifically requested by the director. The petitioner's failure to submit this evidence upon request precluded a material line of inquiry into whether the petitioner and the foreign employer are qualifying organizations. Therefore, the director properly denied the petition on this basis.

Also, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the stock certificate and additional materials submitted on appeal to be considered by the director, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. The appeal will be adjudicated based on the record of proceeding before the director. Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations, and the petition may not be approved for this reason.

Furthermore, the record in this matter is so rife with unresolved inconsistencies that it is impossible to confirm either organization's ownership and control. For example, in response to the director's Request for Evidence regarding the ownership and control of the foreign employer, the petitioner submitted a list of owners of the foreign employer indicating that [REDACTED] owns a 26.7% interest. However, the petitioner also submitted a translation of the foreign employer's articles of association which indicate that the foreign employer, [REDACTED] is 80% owned by [REDACTED]. It is unclear whether these two documents concern different companies, whether they concern the same company at different times, or whether they are simply inconsistent with one another. Moreover, in response to the director's Request for Evidence regarding the ownership and control of the petitioner, the petitioner submitted a resolution dated December 20, 2005 indicating that [REDACTED] owns a 60% interest in the petitioner. However, the petitioner also submitted a stock certificate on appeal which indicates that 10,000 shares of stock were issued to "Movell Corporation" on January 31, 2006. The petitioner also asserted in the Form I-129 that it is a "joint venture" of the foreign employer and that the "[c]ompany stock ownership and managerial control of each company" is 40%. The petitioner does not attempt to clarify or resolve any of these fundamental inconsistencies in the record. 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).

Finally, the petitioner has not established that it or the foreign employer is currently "doing business" as defined by the regulations. As properly noted by the director, the petitioner failed to submit a complete copy of its business premises lease upon request. Once again, the 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). As the petitioner's failure to submit a copy of its lease precluded a material line of inquiry into its ongoing business activities, the petition may not be approved for this reason. Moreover, while the record contains evidence that the petitioner began doing business in 2004 (*see supra*), the record is devoid of evidence of any current business activity by the petitioner or the foreign employer. 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)). Therefore, as the petitioner has failed to establish that it or the foreign employer is currently doing business, it has failed to establish that either entity is a qualifying organization.

Lastly, the petitioner's attempt to supplement the record on appeal with a copy of its lease was inappropriate and will not be considered. Not only may the petitioner not submit the lease for the first time on appeal when the director had specifically requested this evidence (*see Matter of Soriano, supra*), the petitioner apparently only submitted a cover letter and not the actual lease. Therefore, despite the petitioner's assertion on appeal, the complete lease was not submitted.

Accordingly, the petitioner has not established that it and the foreign employer are qualifying organizations, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be employed in the United States, or has been employed abroad, 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 performed, or will perform, primarily 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 petitioner may not claim that the beneficiary was, or will be, employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary was, and will be, employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner described the beneficiary's job duties in the United States in a letter dated March 7, 2006 as follows:

We intend to employ [the beneficiary] to fill the Office Manager position in [the petitioner]. In this capacity, [the beneficiary] will manage the office operation for the company. His responsibilities include office administration, hiring, communication with the employees of the [foreign employer]. [The beneficiary] was teaching Computer Science as a professor at a university in China. He is [an] expert of computer.

The petitioner described the beneficiary's job duties abroad in the Form I-129 as follows: "Office Manager. Charge [sic] of Logistics; Personal [sic] Management; Finance Supervision."

On May 11, 2006, the director requested additional evidence. The director requested, *inter alia*, organizational charts for both the foreign employer and the petitioner which include job descriptions for the beneficiary's claimed subordinates, a more detailed description of the beneficiary's duties both abroad and in

the United States, and the petitioner's wage reports for its United States employees for the last four quarters.

In response, the petitioner submitted a document titled "Duties in the U.S." in which the petitioner describes the beneficiary's proposed duties as follows:

[The beneficiary] will manage the office operation for the U.S. entity. His responsibilities include office administration, hiring, communication with the employees of [the foreign employer]. Hold the fort while the boss is absent.

The petitioner submitted an organizational chart for the United States operation and a quarterly wage report for the first quarter of 2006. The wage report indicates that the petitioner employed a chief executive officer, a vice president, and an accounting employee in the first quarter of 2006. The organizational chart indicates that the petitioner also employs a system architect, who reports to the vice president, although this worker does not appear on the most recent quarterly wage report. The beneficiary's position, office manager, is placed beneath the accounting employee on the organizational chart and is not portrayed as having any supervisory or managerial responsibilities over other employees.

The petitioner also submitted an organizational chart for the foreign employer. The beneficiary is portrayed as reporting to the foreign employer's president and as supervising an accountant/cashier, a human resources manager, and an administrator/general affairs employee. The beneficiary's three subordinates are not shown as having supervisory or managerial control over other employees. The petitioner also did not describe the duties of the three foreign subordinates.

Upon review, the petitioner did not establish that the beneficiary has been employed abroad or will be employed in the United States in a primarily managerial or executive capacity, and the petition may not be approved for these additional reasons.

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 in question and indicate whether such duties are either in an executive or managerial capacity. *Id.* As explained above, a petitioner cannot claim that some of the duties of the position entailed, or will entail, executive responsibilities, while other duties were, or will be, managerial. A petitioner may not claim that a beneficiary was, or will be, employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary acted, or 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 did, or will do, on a day-to-day basis. For example, the petitioner states that, in his foreign position, the beneficiary served as the "office manager" and that he was in charge of logistics, personnel management, and finance matters. However, the petitioner does not explain what, exactly, the beneficiary did to perform these duties. Furthermore, the petitioner states that, in the United States, the beneficiary will engage in "office administration" and that he will perform duties related to hiring, communicate with the foreign employer, and

"[h]old the fort while the boss is absent." However, the petitioner similarly fails to explain what, exactly, the beneficiary will do in accomplishing these tasks. The fact that the petitioner has given the beneficiary managerial titles and has prepared vague job descriptions which includes overly broad duties does not establish that the beneficiary actually performed, or will perform, managerial duties. Broad, conclusory statements such as those found in the instant job descriptions are not probative of the beneficiary's performance of managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were 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).

The petitioner has also failed to establish that the beneficiary supervised and controlled, or will supervise and control, the work of other supervisory, managerial, or professional employees. As explained in the record, the beneficiary appears to have supervised three workers abroad. However, the petitioner failed to establish that any of these workers were truly supervisory or managerial employees. Not only are they not portrayed in the organizational chart as having supervisory or managerial control over other workers, the petitioner failed to specifically describe their duties even though the director requested this evidence. Again, 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). Job titles alone do not establish that subordinate workers were supervisory, managerial, or professional employees. Furthermore, the organizational chart for the United States operation does not portray the beneficiary as having any supervisory or managerial responsibilities over other employees. To the contrary, he is shown to be one of the lowest ranked employees in the hierarchy.

In view of the above, the beneficiary would appear to have been, at most, a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. In the United States, it appears that the beneficiary will perform the tasks necessary to provide a service or to produce a product and will not primarily perform qualifying duties. It does not appear that he will be relieved of performing non-qualifying tasks by a subordinate staff. 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). 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. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Furthermore, the petitioner has not established that the subordinate employees abroad were professional employees.¹ Therefore, the petitioner has not established that the beneficiary was, or will be, employed primarily in a managerial capacity.²

¹In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required 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

Similarly, the petitioner has failed to establish that the beneficiary acted, or 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 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 acted, or will act, primarily in an executive capacity. The job descriptions provided for the beneficiary are so vague that the AAO cannot deduce what the beneficiary did,

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).

²While the petitioner has not argued that the beneficiary managed, or will manage, 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 managed, or will manage, an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties were, or will be, managerial, if any, and what proportion were, or will be, non-managerial. Also, as explained above, the record establishes that the beneficiary was, at most, a first-line supervisor of non-professional workers and/or performed, or will perform, non-qualifying operational or administrative tasks. In other words, he will perform the tasks related to the function rather than manage the function. 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 were, or will be, managerial, nor can it deduce whether the beneficiary primarily performed, or will perform, 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).

