

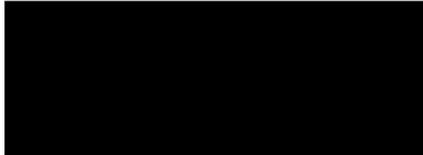
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U.S. Citizenship
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Services

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File: WAC 03 230 50610 Office: CALIFORNIA SERVICE CENTER Date:

OCT 02 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, California 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 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 California and is allegedly an importer and distributor of borosilicate, pharmaceutical glass, bent-neck ampoule, and solar products.¹

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.

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.

¹According to California state corporate records, the petitioner's corporate status in California has been "suspended." Therefore, since the corporation has lost all rights and powers to transact business, the company can no longer be considered a legal entity in the United States. Therefore, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

- (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 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 it is claiming that the beneficiary will 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 petitioner may not claim that a beneficiary will 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.

The petitioner described the beneficiary's job duties in a letter dated August 4, 2003 as follows:

1. [The beneficiary] determines company's policies and establishes business goals. With the business nature in mind, [the beneficiary] considers the company's marketing capability, financial capability and human resource. [The beneficiary] considers competitors' advantage and disadvantages of marketing and financial capabilities and human resource. Furthermore, he takes into consideration the social and economic environment here in the United States. Based upon all of the above, [the beneficiary] determines and formulates the company's policies: product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy. And he sets forth the company's business goals, including market share and revenue and profit they strive to reach in each fiscal year.
2. [The beneficiary] directs the subordinate management. [The beneficiary] assigns authorities and responsibilities to the subordinate management. They will establish their own objectives, working procedures and evaluation systems. [The beneficiary] reviews marketing and financial reports to ensure that the company's objectives are achieved. [The beneficiary] analyzes operations to evaluate company's performance and to determine areas of cost reduction and program improvement. [The beneficiary] directs financial and budget activities to fund operations and increase efficiency. [The beneficiary] demands periodical written reports and routine oral reports from the subordinate management.
3. [The beneficiary] exercises his discretionary authority in decision-making. If the marketing environment greatly changes, he makes resolution [sic] to change the company's business orientation or adjust the business goals. [The beneficiary] also decides on the adjustment of product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
4. [The beneficiary] periodically reports to the parent company in China. [The beneficiary] reports about the performance of the US subsidiary and business opportunities here in the United States. Also, [the beneficiary] receives information and instructions from the parent company.

The petitioner also submitted an organizational chart, which shows the beneficiary at the top of the organization supervising one "general manager," who, in turn, is shown supervising one secretary. Finally, the petitioner submitted California quarterly wage reports which indicate that the petitioner had employed a

total of three people in 2002 and in the first quarter of 2003. The petitioner did not submit a wage report for the second quarter of 2003, or provide any evidence that the petitioner employed anyone as of the date the petition was filed, i.e., August 6, 2003.

On October 25, 2003, the director requested additional evidence. The director requested, *inter alia*, more detailed descriptions of the beneficiary's job duties, the duties of the subordinate employees, and the petitioner's organization.

In response, counsel submitted a letter dated January 14, 2004 in which the petitioner's two claimed subordinate employees are described as follows:

[The general manager] is in charge of the overall management of the US subsidiary company, establishing the operation of the business, hiring and firing employees, developing marketing strategies and business contacts. He reports to the beneficiary.

* * *

The job duties of the secretary include but [are] not limited to answering telephone calls, schedul[ing] meetings for the general manager and the president, receiving and sending mails, data processing and documents filing.

On February 5, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

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

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(1)(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 is 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 petitioner may not claim that the beneficiary will 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 will do on a day-to-day basis. For example, the petitioner states that the beneficiary will determine "policies;" establish "business goals;" establish his subordinates' objectives and working procedures; and review "marketing and financial reports." However, the petitioner does not specifically define these policies, goals, procedures, and objectives

and fails to explain who, exactly, will prepare the marketing and financial reports. It is also not credible that the beneficiary would spend a significant portion of his time directing "the subordinate management" when the record fails to establish that the petitioner had any employees at the time the petition was filed. 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 will actually perform 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).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him. This is particularly important in this matter because some of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will make decisions regarding pricing, products, distribution, human resources, and finances. However, such duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart and job descriptions for the subordinate employees fail to identify any employees who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he will perform these tasks. Not only are these subordinate employees not described as performing these non-qualifying tasks for the beneficiary, the very existence of these employees has not been established given that the petitioner failed to submit any evidence that it employed anyone after the first quarter of 2003. As the petitioner has not established how much time the beneficiary will devote to non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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. As explained in the organizational chart, wage reports, and 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 "general manager" is primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that this vaguely described employee is performing the tasks necessary to produce a product or to provide a service. It is simply not credible that a business of this nature would require a subordinate supervisor to primarily supervise a single secretary, and it appears that the beneficiary is more likely than not supervising both of these individuals. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. Regardless, as explained above, the record is devoid of evidence that the petitioner actually employed anyone after the first quarter of 2003. While the petitioner submitted wage reports indicating that it employed three people, all of this evidence predates March 31, 2003. The instant petition was filed on August 6, 2003. Therefore, it has not been established that the petitioner has any employees. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R.

§ 103.2(b)(2)(i). Once again, 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.

Therefore, even assuming that the petitioner had employees at the time the instant petition was filed, 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 professional. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the skill level or educational background required to perform the duties of the two claimed subordinate positions the petitioner has not established that the beneficiary will manage professional employees.² Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²In 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).

³While the petitioner has not argued that the beneficiary 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 will manage 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 will primarily be a first-line supervisor of non-professional employees and/or will be 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 will primarily 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).

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 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, it appears that the beneficiary will be performing the tasks necessary to produce a product or to provide a service and/or will be a first-line supervisor. 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 failed to establish that it has a qualifying relationship with the foreign employer. 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(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." "Doing business" has been defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the petitioner has failed to establish that it was engaged in the regular, systematic, and continuous provision of goods and/or services at the time the instant petition was filed on August 6, 2003. All of the business documents submitted by the petitioner concern its business activities in January 2003 or before. The record is devoid of any evidence of current business activity. While the petitioner did submit current bank statements and telephone bills, these documents do not establish that the petitioner was engaged in the regular, systematic, and

continuous provision of goods and/or services. Furthermore, as explained above, the record is devoid of any evidence that the petitioner had employees after March 2003.

Accordingly, as the petitioner has failed to establish that it was "doing business" at the time the petition was filed, the petitioner has not established that it has a qualifying relationship with the foreign entity, and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.