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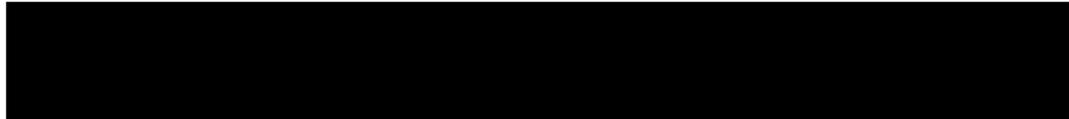
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File: SRC 04 209 53258 Office: TEXAS SERVICE CENTER Date: **OCT 02 2007**

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, 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 employ the beneficiary as its marketing director 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 a preschool and development center.

The director denied the petition concluding that the petitioner did not establish that the beneficiary was employed abroad 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 were primarily those of a manager or executive.

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 primary issue in the present matter is whether the beneficiary was 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 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 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 employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner described the beneficiary's job duties abroad in a letter dated July 20, 2004 as follows:

[The beneficiary's] duties included[:] determining the demand for products and services,

identifying potential customers, developing pricing strategies with the goal of maximizing the firm's profits and the increase of market share, quality control over the company's goods and services, product research and development, testing the market for the development of new products and services.

The petitioner also submitted an organizational chart for the foreign entity which shows the beneficiary reporting to a general manager and supervising a "public relations" employee, a "sales" employee, and a "marketing assistant."

On August 3, 2004, the director requested additional evidence. The director requested, *inter alia*, descriptions of the foreign duties of the beneficiary and the other employees of the foreign entity.

In response, the petitioner submitted a translation of a letter from the foreign entity dated August 5, 2004 describing the beneficiary's duties abroad as follows:

The duties of the Marketing Manager are to coordinate and lead the work of all personnel under her supervision, including:

- a) Identify market trends and plan in terms of comparative advantages and existing opportunities. This takes about 10% of her time.
- b) Order, evaluate, and execute promotional activities and publicity through the PR Department. This takes about 20% of her time.
- c) Control of sales and customers, through the Sales Department. This takes about 50% of her time.
- d) Supervision and handling of budget and personnel. This takes about 10% of her time.
- e) Internal operational control, meetings, report preparation, and interviews. This takes about 10% of her time.

The foreign entity also described the beneficiary's subordinate employees -- the "head of public relations," the "head of the sales department," and the "marketing assistant." All three of these workers appear to be engaged in performing the tasks necessary to produce a product or to provide a service, e.g., visiting customers, organizing events, preparing reports, billing, and ordering. While the "sales" employee is described vaguely as spending 10% of his time coordinating and briefing a "sales force," the record is devoid of specific evidence regarding the existence, size, or duties of this "force."

On August 20, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was primarily employed abroad in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties were primarily those of a manager or an executive.

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(l)(3)(ii) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* As explained above, a petitioner cannot claim that some of the duties of the position entailed executive responsibilities, while other duties were managerial. A petitioner may not claim that a beneficiary was 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 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 on a day-to-day basis. For example, the petitioner states that the beneficiary determined "the demand for products and services," developed "pricing strategies," controlled "product research and development," and spent half of her time controlling "sales and customers." However, the petitioner does not explain what, exactly, the beneficiary did to perform these duties. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary actually performed managerial duties. Broad, conclusory statements such as those found in the instant job description 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 the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the organizational chart and job descriptions, the beneficiary appears to have supervised a "public relations" employee, a "sales" employee, and a "marketing assistant." While the petitioner gave two of these employees more impressive titles in response to the Request for Evidence ("head of the department of public relations" and "head of the sales department"), job titles alone do not establish that subordinate workers are supervisory, managerial, or professional employees. In this matter, the job descriptions for these three subordinate workers fail to establish that they were truly supervisory or managerial employees. To the contrary, these workers appear to have performed the tasks necessary to produce a product or to provide a service, e.g., visiting customers, organizing events, preparing reports, billing, and ordering. While the "sales" employee is described vaguely as spending 10% of his time coordinating and briefing a "sales force," the record is devoid of specific evidence regarding the existence, size, or duties of this "force." Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

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. 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 were professional employees.¹ Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary acted 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.

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 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 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 an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties were managerial, if any, and what proportion were 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 non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties were managerial, nor can it deduce whether the beneficiary primarily performed 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).

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 primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary was, at most, employed as a first-line supervisor and likely performed the tasks necessary to produce a product or to provide a service. Finally, the organizational chart of the foreign employer indicates that the beneficiary reported to a general manager who, in turn, reported to a president. It appears that any authority to realistically direct the organization would have been vested in these individuals and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

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

Beyond the decision of the director, the petitioner also failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner described the beneficiary's proposed job duties as "marketing director" in a letter dated July 20, 2004 as follows:

As director for Marketing [the beneficiary's] immediate goal is to increase the student enrollment through an aggressive advertising campaign. She will also be responsible for establishing a research and development plan in order to evaluate the [petitioner's] services and implement plans to improve them. She will also be responsible for the research and development of a business plan to evaluate the best area for the business expansion for a new day care center in the Central Florida area. She will also be working closely with the parents of the enrolled children in order to gather their input, evaluate the information and suggest to the center's management on implementing services to meet the needs of the customers more effectively.

The petitioner also submitted two organizational charts. The first chart describes the petitioner's organizational structure without the beneficiary. It shows a president supervising a secretary who, in turn, is shown supervising eleven teachers and assistant teachers. The second chart describes the petitioner's proposed organizational structure, which includes the beneficiary. It shows the beneficiary, the marketing manager, reporting directly to the president and supervising all other employees including the secretary, the teachers, the assistant teachers, a maintenance manager, a cook, a housekeeper, and an administrative assistant.

In response to the Request for Evidence, the petitioner submitted a letter dated August 6, 2004, which further

describes the beneficiary's proposed duties. The letter explains, *inter alia*, that the beneficiary's "primary duty will be to manage an essential function within the organization which is the marketing department," even though she is also described as supervising the teachers and other administrative personnel "in the implementation of the marketing strategies." The petitioner also stated in the letter that it employs eleven people and attached job descriptions for its employees. None of the employees is described as working in a "marketing department" or as performing marketing related tasks.

Finally, the petitioner submitted a breakdown of how much time the beneficiary will devote to each of her duties. As this description is in the record, it will not be repeated here. Generally, the beneficiary is described as primarily performing marketing tasks such as market research, promotions, web site development, advertising, establishing contacts in the community, and organizing events.

Upon review, the petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Most of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. Marketing 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 the sales and marketing duties, it must be concluded that she will perform these tasks. 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

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. While the organizational chart indicates that the beneficiary will supervise over ten employees, including all of the teachers and assistant teachers, this claim is simply not credible given the beneficiary's job description. As explained above, the petitioner describes the beneficiary as devoting almost all of her time to performing marketing tasks. The supervision of teachers or assistant teachers is not listed among her duties. Arbitrarily placing a beneficiary on an organizational chart in a position superior to certain employees does not establish that the beneficiary will truly supervise and control those employees. An employee will not be considered to be a supervisor simply because of a job title. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). In this matter, it has not been established that the beneficiary will truly supervise and control any of the subordinate employees.

In view of the above, it appears that the beneficiary will 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. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of*

Church Scientology International, 19 I&N Dec. at 604. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. As explained above, it appears that the beneficiary will primarily perform non-qualifying marketing tasks and will not perform executive duties.

Accordingly, the petitioner has failed to establish that the beneficiary will be employed in a managerial or executive capacity, 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 is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

³The petitioner has also failed to establish that the beneficiary will manage an essential function of the organization, i.e., manage the marketing department. As explained above, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the tasks related to the function. In this matter, as it appears that the beneficiary will perform marketing tasks rather than manage the marketing function, the petitioner has not established that the beneficiary will perform the duties of a function manager. *See generally IKEA US, Inc.*, 48 F. Supp. 2d 22.