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U.S. Citizenship
and Immigration
Services

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[Redacted]

File: WAC 03 259 51145 Office: CALIFORNIA SERVICE CENTER Date: **SEP 07 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)

IN BEHALF OF PETITIONER:
[Redacted]

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 spices and related items.

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.
- (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.

Although the petitioner asserts in the petition that the beneficiary will be performing primarily executive duties under section 101(a)(44)(B) of the Act, counsel implies on appeal that the beneficiary may be performing executive or "functional" manager duties under section 101(a)(44)(A) 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. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be performing either executive *or* managerial duties and will consider both classifications.

The petitioner described the beneficiary's job duties in a letter dated September 12, 2003 appended to the petition as follows:

[The beneficiary] will be the individual responsible who will continue to direct and control the management of our business and she will decide on our policies specifically as it refers to the type/quantity/quality of the spices and/or other product we may import/distribute or export. [The beneficiary] will make all decisions as regards contracts that we may enter into and will so attend to planning and developing the overall business of our corporation[.] She will be responsible for the hiring and firing of all managerial/supervisory staff required and will make the ultimate decisions on other workers that management may wish to hire.

[The beneficiary] continues to will [sic] direct and advice [sic] on the methods required developing and increasing the business of the corporation. She will continue to make all decisions, policy and other executive level decisions in her discretion.

[The beneficiary] will continue to sign all domestic and international contracts and her signature will be binding on our corporation in view of the authority that will be vested in her as President and Chief Executive Officer. She will report to the Board of Directors from time to time on the progress of the business.

As regards more detailed specifics of the beneficiary[']s duties we wish to advise as follows:

- Responsibility for all Executive level decisions in the business and attending to and making such decisions. 20%
- The responsibility for the overall control of the business and the guiding and planning of the business policies, strategies and goals. 25%
- In the beneficiary[']s sole discretion the setting and determining the policies, strategies, business practices and philosophy of the business. 15%
- Ensuring that all executive level decisions as regards policy, business, strategy and philosophies of the business are implemented by the Managerial staff and through them to the Supervisory staff and the workers. Such staff to report to the beneficiary on performance of their department and related areas[.] 20%
- Responsibility to hire and fire Upper Managerial staff and/or determine sanctions or otherwise as regards these employees. 10%
- Responsibility for ultimate decisions on all contracts that are negotiated and authority to accept and sign such contracts or reject the contracts proposed. 10%[.]

The petitioner further asserts that it has five "employees" including the beneficiary. In support of this assertion, the petitioner submitted an organizational chart in which the beneficiary is shown to be at the top of the organization directly supervising a general manager who, in turn, is shown to be supervising an "imports" employee, an "admin/sales" employee, and a marketing employee. The "admin/sales" employee is portrayed

as managing a third party logistics company in its provision of services to the petitioner. All four of the subordinate employees are alleged to have earned university degrees.

The petitioner also submitted its Forms 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2003, for all four quarters of 2002, and for three of the quarters of 2001. Contrary to the above-described organizational chart and support letter, these tax documents indicate that the petitioner had no employees, and no payroll, in the first quarter of 2003 and has never had more than three employees.

Finally, the petitioner submitted copies of four checks made payable to each of the four subordinate workers identified in the organizational chart. Each check is for approximately \$450.00 and is dated August 29, 2003.

On September 22, 2003, the director requested additional evidence. The director requested, *inter alia*, a list of all employees in the United States; a more detailed organizational chart including job duties of all employees; federal and state wage reports and payroll summaries for the last four quarters; and audited financial statements for the petitioner.

In response, counsel submitted a letter dated October 5, 2003 which reiterates that the petitioner employs five people at its business location in Rolling Hills Estates, California. Counsel also submitted the petitioner's wage report for the second quarter of 2003 which indicates that the petitioner employed only the beneficiary during that quarter. The petitioner provided no further evidence regarding its employees or its payroll in 2003 other than the four checks submitted with the initial petition. The instant petition was filed on September 15, 2003.

Furthermore, the petitioner submitted a more detailed organizational chart in which the "general manager," who allegedly supervises the other three subordinate employees, is described as follows:

General Management of [the petitioner] with regard to administration of [the petitioner] reporting directly to [the beneficiary.] Basic Salary \$6000 per annum+perks+commission on annual gross income.

The petitioner, however, did not submit any evidence that the general manager has received more than approximately \$450.00 on August 29, 2003 as remuneration, did not describe the "perks," and did not describe how much money in "commissions" the general manager had earned in 2003.

Finally, the petitioner failed to submit an audited financial statement and explained that, because it was not a publicly traded company, it did not need to prepare audited financial statements.

On January 19, 2006, 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, 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(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary 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 a beneficiary is 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 failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary is responsible for the "overall control of the business and the guiding and planning of the business policies, strategies and goals." However, not only does the petitioner fail to define any of the policies, strategies, or goals being planned, the petitioner fails to describe with any specificity what, exactly, the beneficiary does on a day-to-day basis. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary is actually performing managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, given the absence of a subordinate staff, it appears that the beneficiary is primarily performing non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. While the petitioner has ascribed to the beneficiary vague, inflated duties such as "direct and control the management of our business," the record nevertheless indicates that the beneficiary is the petitioner's only employee. While counsel correctly observes on appeal that the beneficiary's singularity may not be the determinative factor in this matter, the fact that the petitioner has not established that the beneficiary is being relieved of the need to perform non-qualifying administrative or operational tasks by a subordinate staff is crucial to the analysis. In this matter, the petitioner has asserted that it employs four workers subordinate to the beneficiary. Not only has the petitioner failed to establish the existence of these "employees" given their complete absence from the petitioner's wage reports, the petitioner has described the workers, who are allegedly compensated largely through a commission-based system, as primarily sales employees. Therefore, the petitioner has not explained who, other than the beneficiary, is engaged in performing those non-qualifying administration and operational tasks inherent in this, and most every, business such as clerical duties, processing accounts receivable, and answering the telephone. Furthermore, choosing and pricing the petitioner's products, i.e., spices, are non-qualifying duties when the tasks inherent to these duties are performed by the beneficiary. 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 and job descriptions for the subordinate staff members, the beneficiary appears to supervise a staff of four employees and, indirectly, the provision of certain specialized services by a contracted service provider. However, as explained above, the petitioner's wage reports for 2003 do not list the four alleged employees, and the petitioner has only established that these "employees" have been paid approximately \$450.00 each in 2003. Therefore, the petitioner has not established that it has any employees other than the beneficiary. Regardless, the petitioner's descriptions of the four alleged employees do not establish that any of these employees is engaged in performing managerial or supervisory duties. To the contrary, it appears that these employees are performing the tasks necessary to produce a product or to provide a service, i.e., commission-based sales activities. In view of the above, even if the petitioner were able to establish that it had any employees other than the beneficiary, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner has not established that the beneficiary will manage professional employees. 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 or a master'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 or master's degree is actually necessary to perform the duties ascribed to the subordinate employees. Therefore, even assuming again that the petitioner has adequately established the existence of these employees, the petitioner has not established that these employees are professionals.

Finally, on appeal, counsel asserts that the beneficiary manages an essential function of the organization. However, the record does not support this position. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to

managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line supervisor of non-professional employees and/or is engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

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

It is appropriate for Citizenship and Immigration Services (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.¹

Beyond the decision of the director, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity because it has failed to establish that it is engaged in "doing business."

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" is 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 petition was filed. As explained above, the record is devoid of any evidence that the petitioner has any employees. The only evidence submitted by the petitioner consists of a wage report from the second quarter of 2003 which indicates that the beneficiary was the petitioner's only employee during that timeframe. The petitioner submitted no evidence establishing that it employed the beneficiary, or anyone else, in September 2003.

Moreover, on September 22, 2003, the director requested that the petitioner submit "copies of latest, audited, corporate financial statements including Balance Sheet and Statements of Income and Expenses." The petitioner, however, has refused to submit audited financial statements, claiming that it is not required by law to maintain such statements. Instead, the petitioner submitted an unaudited financial statement from June 30, 2003 attached to a letter from an accountant commenting that "[m]anagement has elected to omit substantially all of the disclosures required by generally accepted accounting principles." However, the unaudited financial statement is

¹It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of his contention that the beneficiary is primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee of the petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Second, as explained above, the petitioner has not established that the beneficiary is primarily employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she is not primarily performing managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

