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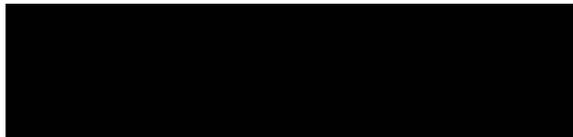
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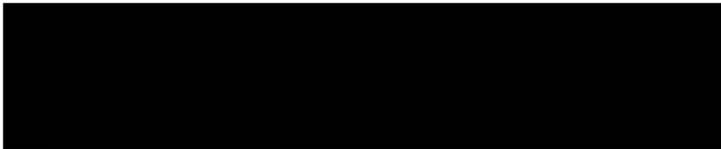
File: EAC 07 048 51859 Office: VERMONT SERVICE CENTER Date: APR 03 2008

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, Vermont 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 "film director cum producer" 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 limited liability company organized under the laws of the State of New York and is allegedly in the multimedia entertainment business.

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 a 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.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform 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 describes the beneficiary's proposed duties and position in the United States in a letter dated

November 21, 2006 as follows:

[The beneficiary's] position is a key managerial one within the structure of [the petitioner] because it will be the Director cum Producer who will oversee, at the executive level, the day-to-day operations of the Film division. [The beneficiary], in that capacity, will be in charge of financing, developing, producing, and distributing feature films. This job entails responsibility for overseeing pre-production in the areas of story development, studio pitches, arrangement of co-production deals, casting, and the assembly of a production team. [The beneficiary] will be responsible for communicating with all departments involved with the production of films during production. He will also supervise post-production processes like editing, effects, and creation of marketing elements. This position will offer a wide latitude of discretionary decision-making to establish organizational goals and policies.

The petitioner asserts in the Form I-129 that it currently employs four workers in the United States.

On December 29, 2006, the director requested additional evidence. The director requested, *inter alia*, a complete description of the beneficiary's proposed position in the United States, complete descriptions of the petitioner's United States employees, and photographs of the United States operation.

In response, the petitioner submitted a letter dated March 12, 2007, in which the beneficiary's proposed position is further described as follows:

Offer creative vision for company's film production slate; create story concepts and develop story treatments for feature films in multiple genres; pitch projects and concepts to studios; arrange co-production deals with international Distributors. Seek out new writers, books and subjects for adaptation; supervise development of screenplays with Screenwriters using knowledge of story structure and dramatic construction. Assemble Production Team and Technical Crews for films; direct all aspects of film production and supervise creative Department Heads. Confer with Production Designer to ensure sets, scenic design and locations conform to overall creative vision. Confer with Director of Photography to achieve specific photographic or digital style and consider utilization of various capturing formats, film stocks, special effects and lighting styles. Work with Production Manager to create schedule of scenes to be filmed each day of shooting, grouping scenes together according to locations and cast of characters. Select Cast through audition process. Rehearse Cast and suggest options for character interpretation, using knowledge of acting, voice and movement to elicit best possible performance. Communicate creative vision to all departments including camera crew, scenery, props, wardrobe, grip and electrical. Supervise Post-Production process. Review dailies; collaborate with Editor to achieve a first assembly cut, rough cut and fine cut of film; supervise creation of sound effects; supervise creation of visual effects; create concepts for main and end titles; confer with Composer to achieve incidental musical score; supervise final sound mix and final color correction. Supervise creation of marketing elements for film including artwork, campaign strategy and creation of theatrical trailers.

*Work Week Average Hourly Breakdown:*

Development Phase

- Writing/Story Development – 20 Hours
- General Management/Organization – 10 Hours
- Investment Strategy/Meetings – 10 Hours

Pre-Production Phase

- Department Meetings/Production Planning – 20 Hours
- Casting – 15 Hours
- Creative Planning (Storyboarding, location scouting, etc.) – 20 Hours

Production Phase

- On Location Directing – 70 Hours

Post-Production Phase

- Supervising Picture Editing – 25 Hours
- Supervising Music – 10 Hours
- Department Meetings/Post-Production Planning – 15 Hours

Marketing Phase

- Press and Marketing Design Supervision – 10 Hours
- Meetings with Distributors/Sales Companies – 10 Hours
- Film Market/Festival Attendance – 20 Hours

The petitioner also described the duties of two of the petitioner's subordinate employees. Both the "music director" and the "musician and music arranger" are described as primarily performing tasks associated with music composition, arranging, performance, and marketing.

On May 21, 2007, 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 asserts that the beneficiary's duties are primarily those of an executive or a manager. Counsel argues that the petitioner, a film production company, hires "professionals and facilities on a project[-]by[-]project basis." Consequently, it is counsel's assertion that the beneficiary, as one who organizes and administers the production of films for the petitioner, supervises these contractors, who are either professionals or supervisors of their own subordinate employees, on a project-by-project basis.

Upon review, counsel'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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, 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.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary

will act in a "managerial" or "executive" capacity. As correctly noted by the director, many of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner asserts in the breakdown of duties that the beneficiary will engage in writing and story development, auditioning cast members, meeting with distributors, and attending film festivals. However, these appear to be non-qualifying tasks associated with the production and marketing of a film. Furthermore, while the petitioner provided a breakdown of the amount of time the beneficiary will devote to each of his duties, the breakdown is divided into development, pre-production, production, post-production, and marketing phases. Crucially, the petitioner did not disclose how much time the beneficiary will devote to each of these phases. For example, it is not clear whether the "development" phase will consume 80%, 10%, or 1% of the beneficiary's time. Since the majority of the beneficiary's duties in the development, pre-production, and marketing phases appear to be non-qualifying tasks necessary to the production of the film, it cannot be concluded that the beneficiary will primarily perform qualifying duties. 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).

Moreover, the record is not persuasive in establishing that the petitioner employs a subordinate staff of employees or contractors dedicated to relieving the beneficiary of the need to perform the non-qualifying tasks inherent to his ascribed duties. While counsel argues on appeal that the petitioner employs "professionals" on a project-by-project basis who will perform many of the tasks necessary to the production of the film, the petitioner fails to specifically describe these contractors or to explain how these workers will relieve the beneficiary of the need to perform the tasks inherent to his duties. For example, the petitioner asserts that the beneficiary will devote a majority of his time during the post-production phase to "supervising picture editing." However, the petitioner fails to explain what, exactly, the beneficiary will do in "supervising" this duty, or who he will supervise, if anyone. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive 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).

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 asserted in the record, the beneficiary will directly supervise a "music director" and a "musician and music arranger." However, these employees are not described as having supervisory or managerial responsibilities. To the contrary, these employees are described as performing the musical tasks necessary to the production of films. Furthermore, the petitioner has failed to establish that any of the claimed "professionals" or contractors hired on a project-by-project basis is a supervisor, managerial, or professional worker. The record is devoid of evidence specifically describing the duties or skills levels associated with any of these claimed contractors.

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. Regardless, the supervision of independent contractors is not a qualifying managerial duty as a matter of law. The Act is quite clear that only the management of employees may be considered a qualifying managerial duty for purposes of this visa classification. Section 101(a)(44)(A)(ii) of the Act.

In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, 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. Moreover, as the petitioner failed to establish the skills and education required to perform the duties of the subordinate employees or contractors, the petitioner has not established that the beneficiary will manage professional employees.<sup>1</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>2</sup>

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<sup>1</sup>In evaluating whether the beneficiary will manage 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).

<sup>2</sup>While the petitioner has not clearly 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 that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that it is more likely than not the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform 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 will 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 act primarily in an executive capacity. The job description provided for the beneficiary, coupled with the absence of evidence addressing his claimed subordinate staff, 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 more likely than not that the beneficiary will be primarily employed as a first-line supervisor and will perform the 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.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform 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 the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv).

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The beneficiary's duties abroad are claimed to be "similar to the position he will fulfill in the United States." Therefore, for the same reasons outlined above, the petitioner has failed to establish that the beneficiary primarily performed qualifying duties abroad. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See*

