

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7



File: EAC 06 225 52985 Office: VERMONT SERVICE CENTER Date: **APR 30 2008**

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:



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 operations manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Texas and is allegedly in the mobile telephone 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 will be primarily those of 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, and counsel asserts on appeal that the beneficiary will be employed in a managerial capacity. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner describes the beneficiary's proposed duties in a letter dated July 24, 2006 as follows:

Management – 70%

Responsible for overseeing the management of the company; Recruiting and terminating

managerial and subordinate employees where the need arises; Liaising with the Manager to oversee daily activities of the company and establishment of procedures and policies; Reviews activity and operations of store management division progress towards stated goals and objective.

Contract Negotiation – 20%

In charge of final approval of contracts with service providers and large customer orders; He has the authority to use her [sic] discretion in binding the company in contractual obligations.

The petitioner did not address to what duties the beneficiary will devote the remaining 10% of his time.

The petitioner claims in the Form I-129 to employ seven workers. While the petitioner submitted quarterly tax returns from 2005 indicating that the petitioner employed at times as many as eight workers, the petitioner did not submit any quarterly wage reports from 2006.

The petitioner also submitted an organizational chart and job descriptions for its subordinate employees. The chart indicates that the beneficiary will report to the president and will directly supervise a "store manager" and an "accounts manager." Each of these claimed subordinate managers is, in turn, portrayed as supervising one or more subordinate workers. The duties of the "store manager" are described as follows:

Reports directly to President. Supervises assistant manager and store employees; Plans and prepares work schedules and assigns employees to specific duties; Formulates pricing policies on merchandise according to requirements for store profitability; Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records; In charge of promotion activities; In charge of marketing and advertising.

The duties of the "account manager" are described as follows:

He is in charge of reviewing financials and budgets; reviewing profit/loss statements; balances books monthly; handles payroll; meets with accountant to file tax returns. Participates in formulating and administering company policies and developing long range goals and objectives; Reviews activity and operations of store management division progress toward stated goals and objectives; Reports directly to President.

On November 22, 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, counsel asserts that the beneficiary's duties are primarily those of a manager. In support, counsel submits a brief and a letter from the petitioner dated December 10, 2006 in which the petitioner further claims that the beneficiary will be responsible for "expanding [the petitioner's] operation to become a nationwide wholesaler of cellular communications products" which will involve hiring additional employees and setting up warehousing and distribution facilities.

Upon review, counsel's assertions are not persuasive.

As a threshold matter, it is noted that a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner's plan to expand its business and to hire additional workers is irrelevant. Any assertion that the beneficiary will be primarily employed in a managerial or executive capacity *after* the speculative expansion of the business or the hiring of additional staff will not establish that the petitioner is eligible for the benefit sought.

Accordingly, 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. 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. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will devote most of his time to "overseeing the management of the company," to reviewing "activity and operations of store management division progress towards stated goals and objective," and to establishing "procedures and policies." However, the petitioner fails to explain what, exactly, the beneficiary will do in "overseeing" the management of the business or to define the goals, objectives, procedures, and policies of the operation. Furthermore, the petitioner has failed to establish that the beneficiary's ascribed duties pertaining to the petitioner's "expansion" efforts will be managerial or executive in nature or that the beneficiary will be relieved from performing the non-qualifying tasks related to setting up warehousing and distribution facilities by subordinate workers. Finally, general managerial-sounding duties such as "oversee daily activities" are not probative of the beneficiary performing qualifying duties. 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). Accordingly, it has not been established that the beneficiary will "primarily" perform managerial or executive 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).

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 "store manager" and an "accounts manager" who are both portrayed as supervising one or more subordinate workers. However, it has not been established that the beneficiary will truly supervise and control these claimed supervisory or managerial employees. As noted in the job descriptions for the "store manager" and the "accounts manager," these workers report "directly" to the president of the business. Therefore, it does not appear that the beneficiary will supervise or control these employees. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. 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)).

Regardless, even if the petitioner established that the beneficiary will supervise and control the "store manager" and an "accounts manager," it has not been established that either of these workers is truly a supervisory or managerial employee. The petitioner describes its business as a seven-employee retail and wholesale operation concentrating on "cell phone products" and claims to be located in a shopping center near a grocery store. The petitioner also claims to have a five-tiered management hierarchy consisting of the president, the beneficiary, the store and accounts managers, an assistant manager, and sales representatives. However, it is not credible that the reasonable needs of the petitioner's seven-employee wireless telephone sales business would require five of its workers to perform supervisory or managerial duties, and it has not been established that either the "store manager" or the "accounts manager" is a supervisory or managerial employee. To the contrary, based on the job descriptions and the size and nature of the petitioner's business, it appears that the beneficiary, store manager, the accounts manager, and the other employees will more likely than not primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

Accordingly, it appears that the beneficiary will primarily be 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. 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 positions, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the

¹In 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

beneficiary will be employed primarily in a managerial capacity.²

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 is so vague that the AAO cannot deduce with any certainty what the beneficiary will do on a day-to-day basis. However, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and/or 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.

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 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 indicates that 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).

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (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 at 1316 (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 full-time for at least one continuous year with a qualifying organization within the three years preceding the filing of the petition. 8 C.F.R. §§ 214.2(l)(3)(iii).

The petitioner claims that the beneficiary was employed abroad by the foreign employer "from July 2001 to July 2004." The instant petition was filed on August 1, 2006, exactly two years after the beneficiary purportedly left the employ of the foreign employer.

On August 15, 2006, the director requested additional evidence establishing that the beneficiary had been employed for one continuous year within the three years prior to August 1, 2006. The director requested, *inter alia*, the beneficiary's last annual tax return and payroll documents.

In response, the petitioner submitted several 2004 "payment vouchers" purportedly evidencing that the beneficiary was paid on a monthly basis by the foreign employer in Pakistan for one continuous year. The petitioner, however, did not submit a copy of the beneficiary's individual tax return as requested by the director.

Upon review, the record is not persuasive in establishing that the beneficiary was employed full-time abroad for at least one continuous year with a qualifying organization within the three years preceding the filing of the petition. First, the most recent "payment voucher" is dated July 31, 2004 and does not even cover a one year period between August 1, 2003 and August 1, 2006. Second, despite being specifically requested by the director, the petitioner failed to submit evidence pertaining to his filing of tax returns in Pakistan reporting his 2004 income. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the petitioner's failure to submit this requested evidence, or to credibly address the unavailability or non-existence of this evidence, precludes a material line of inquiry into whether the beneficiary was employed abroad during the requisite timeframe, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was employed abroad in a position that was primarily managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iv).

The foreign employer described the beneficiary's duties abroad in a letter dated October 5, 2006 as follows:

[The beneficiary] held the position of Production Director. He spent 100% of his time performing executive managerial duties. His duties consisted of overseeing his department and production staff. He had complete discretionary authority in managing his department such as hiring, training, and firing employees. He directly supervised three department managers – Production Manager - Import/Export Manager – and Warehouse Manager. As a part of his responsibilities he supervised department managers to ensure that the volume of business is handled by the subordinate managers and employees to fill orders and receive and process incoming and outgoing shipments. In addition, [the beneficiary] was responsible for developing organizational policies and coordinating operations between managers and departments and establishes responsibilities of each manager and department. He was responsible for reviewing activity reports which reflect the volume of import/export goods and review reports to determine progress in attaining quotas.

Also, [the beneficiary] was responsible for planning production schedules, approving all department expenditures, and preparing budget reports. In order for [the beneficiary] to perform his duties it required that department managers implement operational procedures to increase production, distribution of products are performed timely and company property is safeguarded against damage and theft.

The petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary directly supervising an import/export manager and a production manager who are both, in turn, portrayed as supervising subordinate workers. The warehouse manager is portrayed as reporting to the import/export manager.

Finally, the petitioner described the duties of the beneficiary's purported subordinates abroad. The import/export manager, the production manager, and the warehouse manager are vaguely described as supervising subordinate workers in their performance of tasks related to the manufacturing and export of yarn and garments.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner submitted a vague and non-specific job description which fails to establish what, exactly, the beneficiary did on a day-to-day basis to "oversee" his staff. 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, *aff'd*, 905 F.2d 41. Furthermore, the foreign employer's vague descriptions of the duties of the beneficiary's claimed subordinates fail to establish that any of these workers was truly a managerial, supervisory, or professional worker. A managerial title combined with the petitioner's uncorroborated claim that a subordinate worker "supervised" other workers and an arbitrary requirement that the position requires a university degree will not establish that an employee was truly a managerial, supervisory, or professional worker. 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. Absent detailed descriptions of the duties of both the beneficiary and his

