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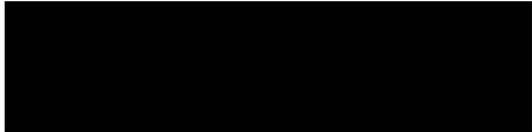
File: WAC 08 049 50621 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2008**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 the beneficiary 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 branch office qualified to do business in the State of California and is allegedly in the laser diode business. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary was employed abroad in a primarily managerial or executive capacity; or (2) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.<sup>1</sup>

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 was employed abroad, and will be employed in the United States, in a primarily executive capacity.

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.

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<sup>1</sup>It is noted that, on appeal, counsel indicates that the director denied the petition on the "sole ground" that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. Upon review, the AAO disagrees with counsel's claim. Taken as a whole, it is clear that the director denied the petition because the petitioner failed to establish that the beneficiary was employed abroad, and will be employed in the United States, in a primarily managerial or executive capacity. Regardless, as the AAO's review of the record and of the director's decision is *de novo*, counsel's assertion is largely irrelevant. The AAO may, in its discretion, consider the sufficiency of the record with regards to all criteria applicable to this visa classification, including those criteria not addressed by the director in her decision. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

- (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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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.

Although counsel on appeal claims that the beneficiary has been and will be employed in an "executive" capacity, 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. Given the lack of clarity, the AAO will assume that the petitioner is asserting 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 duties abroad as "president and chief technical officer (CTO)" in a letter dated November 19, 2007 as follows:

[The beneficiary] oversaw the development of [the foreign employer's] Laser Diode products and related business operations. As company president, [the beneficiary's] duties involved the directing and controlling [of the] parent company's overall operations, including the establishment of company policies and goals, supervision of subordinate employees and directing the sales and development of the company. As the CTO, [the beneficiary's] duties included being responsible for all facets of [the] parent company's technology operations, including the management and successful execution of technical projects and directing the overall technical direction of the company, including determining key initiatives, strategies, and operating plans.

On December 14, 2007, the director requested additional evidence. The director requested, *inter alia*, the number of employees at the foreign location where the beneficiary was employed; an organizational chart for the foreign employer describing its managerial hierarchy, including job descriptions and educational levels for all subordinates under the beneficiary's supervision; and a more detailed description of the beneficiary's duties abroad, including the percentages of time the beneficiary devotes to each of his ascribed duties.

In response, counsel submits a letter dated January 2, 2008 in which the beneficiary's foreign duties are further described as follows:

- As company President and CTO, [the beneficiary] has been overseeing the development of the foreign parent company's Laser Diodes and related business operations; (20%)
- He has been directing and controlling the overall operations of the company, including the establishment of policies and goals, supervision of subordinate employees and directing the sales and development of the company; (35%)
- As the CTO, [the beneficiary] has also been responsible for all facets of the parent company's technology operations, including the management and successful execution of technical projects; and (25%)
- He was directing the overall technical direction of the company, including determining key initiatives, strategies, and operating plans. (20%)

Counsel also claims that the beneficiary supervised "a team of 83 employees, three (3) of whom have supervisory positions" in his purported management of the development department (23 workers), sales and marketing department (6 workers), and production department (54 workers). The three subordinate supervisors are all described as having earned master's degrees in either engineering or physics.

Upon review, the AAO concludes that the petitioner established that the beneficiary was more likely than not employed abroad for at least one year in a managerial capacity, and the director's decision will be withdrawn in part. The petitioner has established that the beneficiary was employed abroad for at least one year as president and chief technical officer. In that capacity, the beneficiary managed a subordinate tier of three departmental supervisors who, in turn, supervised a total of 80 workers. Consequently, the petitioner has established that the beneficiary managed a subdivision of the foreign employer, supervised and controlled the work of other supervisory and/or professional workers, had authority over his subordinates, and exercised sufficient discretion over the operations of the activity for which the beneficiary had authority. Furthermore, it does not appear as if the beneficiary was a first-line supervisor of non-professional workers.

Accordingly, the petitioner has established that the beneficiary was employed abroad for at least one year in a managerial capacity, and the director's decision will be withdrawn in part.

The second issue in the present matter is whether the petitioner has established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner indicates in the Form I-129 that the beneficiary is the United States operation's sole employee. In its November 19, 2007 letter, the petitioner describes the beneficiary's duties as the sole "branch

representative" in the United States as follows:

1. Directing and managing our company's overall operation, including establishing policies and goals, and making necessary changes according to business activity reports, sales records and market research data;
2. Overseeing our company's financial strategy and budget activities, and reviewing sales and activity reports to assess the status and progress of company goals;
3. Coordinating marketing, consulting, and providing proper support to the existing and prospective customers;
4. Directing the sample tests and sales of our laser diodes and related products in the U.S.;
5. Conducting research and collecting data regarding the U.S. laser diode industry and reporting to our parent company;
6. Developing and maintaining new relationships with distributors, partners and customers in the U.S.;
7. Analyzing business operations to evaluate our company's performance and determining areas of improvement; and
8. Reporting progress and maintaining constant contact with our parent company in Korea.

The petitioner also submitted copies of email correspondence between the beneficiary and customers.

On December 14, 2007, the director requested additional evidence. The director requested, *inter alia*, the total number of employees located in the United States; an organizational chart for the United States operation; and a more specific description of the beneficiary's proposed duties, including the percentage of time to be devoted to each of his ascribed duties.

In response, counsel further described the beneficiary's duties in the January 2, 2008 letter as follows:

1. Concentrating on the development and initiation of effective marketing strategies which include direct communication with customers through emails, phone calls, and on-site visitations to their business facilities; (30%)
2. Researching to find out the Laser Diode Industry market, needs, and the modern trend in the U.S. in order to expand the business sales and activities of the Laser Display, the Laser Beam Printer, and the Barcode Scanner in the U.S. (15%)
3. Marketing and Promotion of the Foreign Parent Company's Product and Technology in the U.S. by utilizing the resources in the U.S., including but not limited to catalogs and conventions in order to become one of the best-known laser diode company in the U.S. (25%)
4. Promoting sales of the laser diode products directly from the U.S. office starting with small and medium sized companies who need direct and close technical support for the laser diode products. (15%)
5. Providing consultation to the existing clients and prospective clients in the U.S. (15%)

Counsel again notes that the beneficiary is the petitioner's only employee, although it appears that his salary is paid by the foreign employer and not by the petitioner. Counsel also notes that the petitioner plans to hire three or four employees in 2008.

On January 24, 2008, 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 will primarily perform executive duties in the United States.

Upon review, counsel's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the beneficiary is not performing qualifying duties within one year of petition approval, the petitioner is ineligible by regulation for an extension. Future hiring or business expansion plans may not be considered. 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). In the instant matter, the petitioner has not established that the United States operation has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 described the beneficiary as primarily performing non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive duties. For example, the petitioner describes the beneficiary as communicating with and visiting customers, performing market research, and marketing and promoting the petitioning organization's products. However, the petitioner has not established that any of these tasks is a qualifying managerial or executive duty. 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). To the contrary, sales, marketing, and customer relations duties are the tasks necessary to the provision of a service or the production of a product. Furthermore, the record does not establish that the beneficiary, as the petitioner's sole employee, will be relieved of the need to perform these non-qualifying tasks by a subordinate staff. 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.

Accordingly, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks in his ongoing administration of the business as the petitioner's sole employee. 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). Although counsel on appeal claims that the beneficiary's duties are qualifying, he submits no evidence corroborating this assertion. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).<sup>2</sup>

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. As explained above, it appears more likely than not that the beneficiary will primarily perform the tasks necessary to produce a product or to

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<sup>2</sup>While 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 tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's 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 perform non-qualifying 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).

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 has failed to establish that the United States operation has been "doing business" for the previous year.

As noted above, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by evidence that the United States operation has been "doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year." "Doing business" is defined in relevant part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of any agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the petitioner has failed to establish that it has been doing business for the previous year. To the contrary, it is more likely than not that the petitioner is a mere presence of an agent or office in the United States. The petitioner indicates that it has no employees other than the beneficiary, who does not appear to be paid a salary from a United States source. Furthermore, counsel indicates in the January 2, 2008 letter that it has not generated any income. It appears that the beneficiary has simply been representing the foreign employer as a mere agent and has been marketing its products in the United States.

Accordingly, as the record is devoid of evidence establishing that the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services during its first year in operation, 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

