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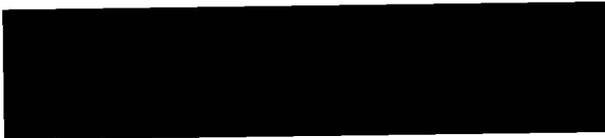
NOV 03 2008

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

- (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 first issue in this proceeding is whether the petitioner has established that the beneficiary was employed abroad in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary primarily performed 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 was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary was employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner described the beneficiary's duties abroad in a letter dated October 12, 2007 as follows:

[The beneficiary] has served as the Business Department Vice Manager of [the foreign employer] since February 2005. From March 2006 to July 2007, [the beneficiary] worked as Operations Vice President in charge of the company's operations, for Business Department and Integration and Management Department. His duties included [sic] in charge of company overall management. Participating [sic] in establishing and formulating company policies, managing the Business Department and Integration and Management Department and its managers. Exercises [sic] the discretionary decision-making over the day-to-day operation. Has [sic] authority to hire, terminate, evaluate and promote managerial staff in subordinate departments based on their job performance, qualification[s] and contributions.

The petitioner also submitted an organizational chart and employee list for the foreign employer. However, neither the beneficiary's position nor the departments he purportedly manages appear on the chart.

On December 5, 2007, the director requested additional evidence. The director requested, *inter alia*, evidence addressing the number of workers employed abroad; a more detailed organizational chart, including job descriptions for all employees under the beneficiary's supervision abroad; and a more detailed description of the beneficiary's duties abroad.

In response, the petitioner submitted a letter from the foreign employer dated February 15, 2008 in which the beneficiary's duties abroad are described as follows:

[The beneficiary's] duties included formulating the fiscal year sales plan of the company and implement to fulfill [sic] it; developing and coordinating the relation between enterprise and its customers; market researching, data collection and analysis; building up and fostering the professional team and daily managing; in charge of operation of the company's business department and purchasing of materials; organizing formulate rules and regulations for professional management and setting up of inner institution; organizing appointment, examination, allocation, promotion, reward and punishment, and dismissal of marketing professional personnel in the subsiding departments within the scope of manning quota; organizing formulate and to report to General Manager the monthly signing of marketing contracts and their implementation state and fulfilling state of targets; organizing formulate and to report to General Manager the recover state of monthly fund, pre-estimation of the fund needed and the state of storage; coordinating the work co-operation between the marketing department and other departments; fulfilling temporary work given by General

Manager on time.

The petitioner also submitted a more detailed organizational chart which portrays the beneficiary as the foreign employer's "professional vice general manager" supervising the "professional department" (13 workers) and the "comprehensive business department" (10 workers). Although the petitioner identifies two workers as supervisors subordinate to the beneficiary, the record is devoid of job descriptions for these claimed subordinate supervisors.

On April 15, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad primarily in a managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary primarily performed qualifying duties abroad. Counsel also submits additional evidence pertaining to the beneficiary's claimed job duties abroad.

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 performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entailed executive responsibilities, while other duties were managerial. Again, a petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary acted 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 did on a day-to-day basis. For example, the petitioner states that the beneficiary formulated the "fiscal year sales plan," coordinated customer relations, took charge of market research, formulated rules and regulations, and generally "managed" the professional team, the business department, materials purchasing, and reporting to the general manager. However, the petitioner fails to specifically describe the "sales plan" or the formulated rules or regulations, or explain what, exactly, the beneficiary did to manage customer relations, market research, or materials purchasing. The fact that a petitioner has given a beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that a beneficiary actually performed managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Consequently, the record is not persuasive in establishing that the beneficiary primarily performed qualifying duties abroad. As noted above, the petitioner asserts that the beneficiary "managed" the performance of his duties through a subordinate staff. However, the record does not establish that subordinate workers relieved the beneficiary of the need to perform the non-qualifying tasks inherent to his ascribed duties. Not only are the beneficiary's managerial-sounding duties so vaguely described that it cannot be discerned whether these duties were truly qualifying (*see supra*), the petitioner also failed to establish that the foreign entity employed workers dedicated to relieving the beneficiary of the need to perform non-qualifying tasks. The petitioner failed to describe the duties of the subordinate supervisors and workers, even though this evidence was specifically requested by the director in the Request for Evidence. 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). Absent descriptions of the duties of the beneficiary's purported subordinate workers, it is impossible to discern whether the beneficiary was relieved of the need to primarily perform non-qualifying tasks. Accordingly, it appears more likely than not that the beneficiary primarily performed non-qualifying first-line supervisory, administrative, or operational tasks in his position abroad. 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 also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As claimed in the record, the beneficiary directly supervised two subordinate "managers" who, in turn, each supervised 10 or more workers. However, as noted above, the petitioner failed to describe the duties of these claimed subordinate "managers," or their subordinate workers, even though this evidence was specifically requested by the director. Once again, 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). Accordingly, it cannot be concluded that any of these claimed subordinates was a bona fide managerial, supervisory, or professional worker, and it appears that the beneficiary was, at most, a first-line supervisor of non-professional employees. 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 604.²

²In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.³

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary did on a day-to-day basis. As explained above, it appears more likely than not that the beneficiary was primarily employed as a first-line supervisor and performed the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

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

³While the petitioner has not argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary managed the function rather than performed the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. The petitioner's vague job description fails to document that the beneficiary's duties were primarily managerial. Also, as explained above, the record indicates that the beneficiary was more likely than not primarily a first-line supervisor of non-professional workers or a performer of 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 were managerial, if any, nor can it deduce whether the beneficiary was 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).

The second issue in the present matter is whether the petitioner established that the beneficiary was employed abroad full-time for one continuous year within the three years preceding the filing of the instant petition. 8 C.F.R. § 214.2(l)(3)(iii).

In support of the petition, the petitioner submitted a translation of a document titled "certificate" which indicates that the beneficiary was employed abroad from February 2005 until July 2007. The petitioner also submitted a second document also titled "certificate" which lists the beneficiary's monthly salary from February 2005 until September 2007.

On December 5, 2007, the director requested additional evidence. The director requested, *inter alia*, payroll records pertaining to the beneficiary's employment in the year preceding the filing of the petition.

In response, the petitioner submitted copies of the beneficiary's pay stubs indicating that the beneficiary received a steadily increasing monthly salary from the foreign employer beginning February 2005 and ending in December 2007, the month in which the Request for Evidence was sent by the director.

On April 15, 2008, the director denied the petition. The director concluded that, because the pay stubs submitted in response to the Request for Evidence do not "list any information regarding the beneficiary's dates of employment abroad," the petitioner failed to establish that the beneficiary was employed abroad full-time for one continuous year within the three years preceding the filing of the instant petition.

Upon review, the AAO disagrees with the director and will withdraw this part of the decision. The copies of the pay stubs submitted by the petitioner bear the date of issue at the top of each pay stub. Accordingly, based on the evidence submitted by the petitioner, it appears more likely than not that the beneficiary was employed full-time for one continuous year within the three years preceding the filing of the instant petition, and this portion of the director's decision shall be withdrawn.

Nevertheless, as the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity, the appeal shall be dismissed and the petition denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.