

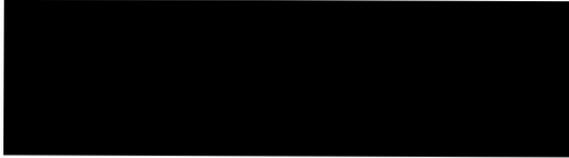
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File: EAC 08 145 52403 Office: VERMONT SERVICE CENTER

Date: OCT 10 2008

IN RE: Petitioner:
Beneficiary:



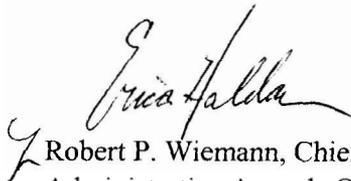
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 petition seeking to extend the beneficiary's employment as its 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, a corporation organized in the State of Maryland, claims to be engaged in food sales and supplies. The petitioner claims that it is the affiliate of The Zone Foods CD, Ltd. located in Seoul, South Korea. The beneficiary was previously granted one year in L-1A classification to open a new office and the petitioner seeks to extend the beneficiary's stay for three additional years.

On June 19, 2008, 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 or that the petitioner had grown to the point where it could support the beneficiary in such a capacity. On appeal, counsel contends that the director's decision was erroneous, and claims that the director erred by failing to consider the beneficiary as a function manager. In support of this contention, counsel submits a brief and additional evidence.

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 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The 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 request for extension, filed on Form I-129 on March 20, 2008, indicated that the petitioner currently employed two persons. On the L Classification Supplement to Form I-129, the petitioner simply stated that the beneficiary's duties in the United States consisted of "managing and operating the United States affiliate."

On May 5, 2008, the director requested additional evidence. Specifically, the director requested a complete position description for all of the petitioner's employees, including the beneficiary, as well as an organizational chart. The director also requested a breakdown detailing the number of hours the employees devoted to each of their duties on a weekly basis. Additionally, the director requested copies of the petitioner's W-2 Forms for 2007, a copy of its payroll for April 2008, and a copy of its quarterly tax return for the period ending March 2008. Finally, the director requested documentation pertaining to any contract employees used by the petitioner.

In a letter dated May 29, 2008, counsel for the petitioner responded to the director's request. The petitioner submitted a copy of Forms W-2, Wage and Tax Statements, for 2007 for the following persons:

<u>Name</u>	<u>Wages Paid</u>
Beneficiary	\$17,500
██████████	\$ 7,540
██████████	\$ 7,540

It is noted that the home address for both the beneficiary and ██████████ listed on their Form W-2, is identical to the business address of the petitioner.

The petitioner submitted an undated statement prepared by [REDACTED], C.P.A., who appears to be the foreign entity's accountant. Mr. [REDACTED] provided the following overview of the beneficiary's duties:

The Manager of the Corporation, [the beneficiary] is managing the US affiliate in the United States as Manager. As Manager of the Company his duties [are] to implement the policies and decisions[;] handle cash transactions, prepare record and bank deposits; make recommendations to the parent company; prepare work schedule and assign specific duties to the workers; coordinate sales promotion activities; prepare merchandise displays and advertising; keep operating records[;] order and receive merchandise; direct and develop the business; formulate merchandising policies and coordination [of] merchandising activities[;] establishes operational procedures for verification of incoming and outgoing shipments; hire and coordinate employees.

An organizational chart for the U.S. office provided in response to the request for evidence lists [REDACTED] identified on Form W-2, as a Field Associate under the beneficiary's supervision, and lists another person, [REDACTED], who was not previously identified, as a Marketing Associate. Although requested by the director, the petitioner did not submit position descriptions for the beneficiary's subordinates.

On June 19, 2008, the director denied the petition, finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Specifically, the director found that the beneficiary was not supervising professional employees, and found that the description of duties for the beneficiary provided in response to the request for evidence was exceptionally vague. The director further noted that the petitioner failed to submit specific pieces of evidence, such as the April 2008 payroll for the petitioner, and concluded that based on these deficiencies, the petitioner had failed to reach the point where it could employ the beneficiary in a qualifying capacity.

On appeal, counsel contends that the beneficiary's position has been "well described" and the beneficiary has won substantial contracts for the petitioner. Counsel further claims that the petitioner has satisfied its burden by a preponderance of the evidence, and also alleges that the director should have considered the beneficiary as a manager of an essential function.

Upon review, the AAO concurs with the director's findings.

Despite the petitioner's contentions that the beneficiary will function in a qualifying position, the information submitted with regard to the beneficiary's position, coupled with the inconsistent employment records and contradictory claims with regard to staffing, suggests that the beneficiary performs most of the day-to-day duties required to operate the company, and thus could he not be considered primarily a manager or executive. The AAO will begin by examining the duties of the beneficiary.

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 definitions of executive and

managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As concluded by the director, the petitioner provided an extremely vague description of the beneficiary's duties. With the initial petition, the petitioner merely claimed that he "managed and operate[d] the United States affiliate." When asked for a more specific overview of his duties, including a breakdown of the percentage of time devoted to each duty on a weekly basis, the petitioner merely provided a statement from a C.P.A. which provided a generic overview of the beneficiary's alleged managerial duties, and a chart which appeared to outline the beneficiary's duties abroad and not in the United States.

In the request for evidence, the director asked the petitioner to submit a *complete position description* for all employees, not just the beneficiary. The petitioner, however, failed to submit a specific overview of the beneficiary's duties with a breakdown, and submitted no statement at all with regard to the duties of the beneficiary's claimed subordinates in the United States. 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). Moreover, on appeal, the petitioner contradicts these earlier statements and no longer claims that the beneficiary manages a subordinate staff.

Consequently, the description of duties on record prior to adjudication fails to specifically state the exact nature of the beneficiary's duties. More importantly, the petitioner fails to articulate the exact nature of the beneficiary's position with regard to the proposed business goals of the petitioner and the role which the beneficiary plays within this structure. 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). In this matter, the recitation of the beneficiary's duties by the C.P.A. includes an abundance of tasks with no specific outline to clarify to what extent the beneficiary is engaged in each task. For example, duties such as "implement the policies and decisions," "handle cash transactions," and "order and receive merchandise" are too vague to allow the AAO to determine the exact nature of the beneficiary's role in the company. The director afforded the petitioner an opportunity to supplement the record with a more specific description of the beneficiary's duties yet the petitioner failed and/or refused to do so. Additionally, many of the duties cited by ██████████ in his letter include non-qualifying tasks, such as preparing merchandise displays, advertising, and ordering and receiving merchandise. As a result, the AAO cannot determine the exact nature of the beneficiary's duties in the context of the petitioner's stated business or determine whether his duties are primarily managerial or executive in nature.

The petitioner also provided contradictory information regarding the beneficiary's subordinates. While it submitted an organizational chart listing two subordinate employees, only one of these alleged subordinates in the U.S. was issued a W-2 form for 2007. Moreover, the petitioner failed to submit a copy of its payroll for the month of April 2008 as specifically requested by the director. Instead, the

petitioner provided payroll records for the beneficiary only. As previously stated, 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).

Moreover, the AAO notes that the home address for the beneficiary and [REDACTED], as listed on their W-2 forms for 2007, is the same address as that of the petitioner. Additionally, the petitioner claimed on Form I-129 that the company is located in Baltimore, Maryland, and not Fairfax, Virginia as claimed on these tax documents. These inconsistencies have not been addressed by the petitioner, and raise questions with regard to the veracity of these documents. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

It is further noted that despite the number of documents submitted in support of the petition, it remains unclear what type of business the petitioner is operating. On Form I-129, the petitioner claimed to be engaged in food sales and supplies. On Schedule K of its Form 1120, the petitioner indicates that it is a consulting/restaurant business. Finally, the petitioner's articles of incorporation state its purpose as a retail business. Again, as stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 582, 591-92.

On appeal, the petitioner submits more detailed evidence, including a more detailed position description for the beneficiary, a breakdown of the beneficiary's average work day and work week, and a detailed overview of the position of the beneficiary's subordinates. However, the AAO will not consider this evidence. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

In addition, the petitioner for the first time on appeal alleges that the beneficiary is managing an essential function and is thus qualified for the benefit sought. The petitioner also now claims that the beneficiary does not manage subordinates as previously claimed. There are two problems with this contention. First, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a

deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Second, even if the AAO was to consider the beneficiary for eligibility as a function manager, the petitioner has failed to satisfy its evidentiary burden. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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, 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. 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. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Although additional evidence is submitted on appeal in support of this alternative basis for the beneficiary's qualifications, for the reasons set forth above, the petitioner failed to submit such evidence at the time it was requested and thus it will not be considered.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional employees in the future, and will require approximately two years to satisfy its initial business plan. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

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.**

ORDER: The appeal is dismissed.