U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 150 55172 Office: VERMONT SERVICE CENTER Date: NOV 05 2004

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
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 employment of its president 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 in the State of New York in 1999 engaged in the metal trading business. It claims that it is the wholly owned subsidiary of an organization established in China. The beneficiary was initially 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 that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The petitioner filed a motion to reopen and reconsider the matter; the director granted the motion but affirmed his previous decision.

The petitioner subsequently filed an appeal. On appeal, counsel for the petitioner submits a brief, a detailed job description of duties performed by the beneficiary and the petitioner's vice-president, additional documentation regarding the immigration status of the petitioner's employees, and updated federal and state payroll tax forms.

Counsel submits evidence that Citizenship and Immigration Services (CIS) approved an immigrant visa petition (Form I-140) filed by the petitioner on behalf of the beneficiary of this nonimmigrant petition on March 13, 2003. The application was filed pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. Counsel asserts that this information, when duly considered by CIS, will result in the approval of this I-129 nonimmigrant petition. However, the AAO must emphasize that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO does not have the I-140 record of proceeding before it. The AAO will adjudicate this L-1A appeal based on the record of proceeding before it.[1]

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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.

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[1] On June 30, 2004, the AAO received a letter and a G-28, Notice of Entry of Appearance for new counsel. New counsel submits documents allegedly submitted in rebuttal to the notice of intent to deny the petitioner's I-140 petition. The AAO observes that these same documents had been previously submitted and are addressed in the decision below. Counsel urges that the AAO sustain this appeal to promote goodwill and show a consistency of adjudication and deflect criticism that CIS makes inconsistent determinations where the issues are largely the same. However, this argument does not address or satisfy the petitioner's burden of proof in this separate proceeding. Again, when making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The regulation at 8 C.F.R. § 214.2(l)(3) further 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, that 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 position 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 this proceeding 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), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

In a March 10, 2001 letter appended to the petition the petitioner stated that the beneficiary would continue to supervise and control the operations at the New York office and would work closely with the vice-president evaluating and reviewing trade deals. The petitioner noted that the beneficiary would also "evolve new strategies and programs to expand our business," and would "initiate personnel actions, such as hiring, promotions, transfers, discharges, or disciplinary measures." The petitioner listed the beneficiary's duties as including:

(1) Supervise a team of technical and service managers who will be in charge of the operations of our metal exports.
(2) Supervise the management of personnel who run the day-to-day operations of business at our company in New York.
(3) Provide strategic technology[.]
(4) Provide final authority over personnel actions, such as hiring, promotions, transfers, discharges, or disciplinary measures to maintain the company's structure in good shape[.]
(5) Report to and receive direction from the parent company in China[.]

(6) Attend metal trade and/or metal recycling conference.

In a May 24, 2001 request for additional evidence, the director requested that the petitioner submit the following in support of the beneficiary's employment as a manager or executive: (1) a complete position description for all of the petitioner's employees in the United States including the beneficiary's position; (2) a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (3) the minimum education requirements, if any, of positions under the beneficiary's control and how the educational requirements were used to perform the beneficiary's subordinates' job duties; (4) evidence documenting the use of independent contractors, the wages paid, and the duties performed; (5) copies of Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Tax Return, for the last quarter of 2000 and the first quarter of 2001; (6) a copy of all IRS Forms W-2, Wage and Tax Statement, and IRS Forms 1099, Miscellaneous Income, issued by the petitioner; (7) 1999 and 2000 IRS Forms 1120, U.S. Corporate Income Tax Return.

In response, the petitioner provided the following job description for the beneficiary:

> Formulate and implement development policies, plans, business strategies, and goals for the branch company in United States – 12 hours.
> Direct metals export operation and job orders to employees through vice-president – 10 hours.
> Review and make decisions based on operation reports – 5 hours.
> Acting as a chairman in weekly meeting to discuss business – 3 hours.
> Read business newspapers and magazines to observe and analyze the metals market – 5 hours.
> Review and write reports for the parent company's head office – 5 hours.

The petitioner indicated that the vice-president spent 10 hours receiving instructions from the president and directing employees to follow the instructions; 10 hours accompanying other employees to meetings with clients; 10 hours listening to "capital flow reports" and preparing financial reports to the president, and reviewing quality/quantity claim reports; 5 hours assisting the president in making business plans; and 5 hours composing reports to the president.

The petitioner also stated that the trade manager/purchase representative spent 10 hours working to resolve quality, price, and order problems with vendors; 10 hours contacting the shipping lines, insurance company, and inspection company; 5 hours following instructions and writing reports; 5 hours contacting the parent company's employees regarding quality, quantity, customs, and claims problems; 5 hours contacting vendors and customers; and 5 hours preparing financial reports and taking care of bill payments. The petitioner stated that the accounts manager/purchase representative spent 25 hours checking and buying scrap metal; 10 hours making financial analysis reports and taking care of daily accounting matters; and 5 hours creating reports about corporation expenses and capital flow. The petitioner stated that the part-time receptionist answered phones and cleaned the office.

On January 30, 2002, the director denied the petition. The director determined that the petitioner's trade manager and account manager were employed part-time. The director acknowledged that the trade manager and accounts manager had adjusted their status to lawful permanent residents as employment-based executives or managers; the director observed, however, that the position descriptions for the staff members did not demonstrate the claimed managerial or executive nature of their duties. The director determined,

based on a review of the petitioner's sales invoices and other documents, that the beneficiary and the other staff members were predominantly involved in soliciting sales transactions.

On March 1, 2002, the petitioner filed a motion to reopen and reconsider the director's decision. Counsel for the petitioner provided evidence that the petitioner's trade manager and accounts manager were full-time employees. Counsel also clarified that the *vice-president* and the trade manager had adjusted status to lawful permanent resident through approval of employment-based I-140 executive or managerial petitions. Counsel also elaborated on the duties of the petitioner's employees. Counsel submitted correspondence signed by the beneficiary regarding the beneficiary's evaluation of the metals markets and correspondence from unrelated companies stating that the beneficiary had "full responsibility for managing [the petitioner's] sales function." Counsel asserted that the beneficiary's subordinates, the vice-president, the trade manager, and the accounts manager, all held professional positions. Counsel claimed that the beneficiary managed an essential function, functioned at a senior level within the organizational hierarchy, and exercised discretion over day-to-day operations. Counsel included letters from various unrelated companies indicating that the beneficiary had established policies and was the ultimate decision-maker in binding the petitioner in its transactions. Counsel also cited an unpublished decision and a district court decision in support of the proposition that CIS should not place undue emphasis on the size of a company when determining managerial capacity.

On August 6, 2002, the director reopened his previous decision but ultimately concluded that the updated position descriptions did not establish that the beneficiary's subordinates held managerial, executive, or professional positions. The director also concluded that the record did not show who was performing the day-to-day duties required to generate the organization's revenues, if not for the beneficiary and the other "managers" and "executives." The director further concluded that the petitioner had not established that the beneficiary was managing an essential function.

On appeal, counsel for the petitioner clarifies the nature of the petitioner's business, indicating that the petitioner's main task is to buy metals in the United States and ship those metals to China and other regions. Counsel asserts that the trade manager/purchase representative, the accounts manager/purchase representative, and the part-time receptionist, perform the petitioner's operational tasks. Counsel claims that the vice-president manages and supervises professional employees. Counsel claims that the beneficiary, as president, controls supervisory, professional, and managerial employees.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided a nonspecific and contradictory description of the beneficiary's duties. The petitioner initially stated that the beneficiary "supervised" and was the final authority over the petitioner's personnel, provided strategic technology, attended conferences, and reported to the parent company in China. This description, although nonspecific, corresponds more to the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act. In response to the director's request for evidence,

the petitioner indicates that the beneficiary spends 17 hours on policy and making decisions, 10 hours directing operations through the vice-president, and 13 hours reading newspapers, reporting to the parent company in China, and chairing meetings. This description, with its emphasis on policy and decision-making, is more akin to the definition of executive capacity. As observed above, the petitioner has not indicated whether the beneficiary will be employed primarily as a manager or primarily as an executive. Moreover, the petitioner has presented two disparate definitions in an attempt to qualify the beneficiary for either the managerial classification or the executive classification. 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).

In addition, the first description demonstrates that the beneficiary supervises personnel, provides strategic technology, and attends conferences. These duties are more indicative of an individual who performs operational tasks including those of a first-line supervisor.[2] 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. *See* section 101(a)(44)(A)(iv) of the Act.

The petitioner's second iteration of the job has the beneficiary "formulat[ing] and implement[ing] development policies, plans, business strategies, and goals," and "direct[ing] metals export operation and job orders to employees through vice-president." The petitioner does not adequately define the goals or policies. Further, the petitioner does not explain the necessity of directing the trade representatives and receptionist through the vice-president. Creating an artificial layer of supervision to demonstrate organizational complexity is not persuasive. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (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). 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, supra.*

Further, on motion to reopen and reconsider, counsel asserted that the beneficiary also manages an essential function. Counsel submitted correspondence from companies doing business with the petitioner to substantiate that the beneficiary has "full responsibility for managing [the petitioner's] sales function."[3] However, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner apparently is attempting to claim that the beneficiary's duties are primarily "managerial." This iteration of duties further confuses the record. Not only does the petitioner fail to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the

[2] The petitioner initially did not provide job descriptions for the beneficiary's subordinates or any evidence that these individuals held professional positions.

[3] The letters submitted are not signed under penalty of perjury or sworn to or affirmed by the signers before an officer authorized to administer oaths or affirmations. Such letters are not probative. Further, there is no evidence that the individual signers have knowledge or understanding of basic immigration law.

petitioner fails to clarify its previous descriptions of the beneficiary's duties. The petitioner's failure to document what duties would be managerial and what duties would be non-managerial is also important because several of the beneficiary's daily tasks, such as attending conferences, reading newspapers, and providing strategic technology do not fall directly under traditional managerial duties as defined in the statute. The AAO cannot conclude that the beneficiary is 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).

Moreover, 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As stated above, 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. *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner's only articulation of the "essential function" is that the beneficiary manages the sales function, and the petitioner clarifies on appeal, that the petitioner's business is not "sales" but rather the purchase of metal products for export to China. 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. *Matter of Ho*, 19 I&N Dec. at 591.

Finally, the record does not support counsel's assertion that the beneficiary controls supervisory, professional, and managerial employees. As alluded to above, the vice-president's position appears to have been created to add complexity to the petitioner's organizational structure. More importantly, the description of the vice-president's duties on appeal mirrors the president's duties. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not articulated why the president and vice-president perform essentially the same duties and how the reasonable needs of the petitioning enterprise justify both the positions of president and vice-president. The petitioner has not shown that the vice-president's position should be considered a professional position based on the general duties of listening to and reviewing reports, receiving instructions and communicating those instructions to other employees.

The petitioner has not established that the trade manager/purchase representative and the accounts manager/purchase representative positions are professional positions. 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). The trade manager/purchase representative works with vendors on price and quality and has contact with shipping lines; the accounts manager/purchase representative acts as the organization's buyer and makes financial analysis reports. The AAO acknowledges that these duties require skill and experience in the non-ferrous metals industry, but such skill and experience do not elevate these positions to professional positions.

The petitioner has not established that the beneficiary controls supervisory, professional, or managerial employees. Although the trade manager/purchase representative, the accounts manager/purchase representative, and the part-time receptionist may perform some of the petitioner's operational tasks, the beneficiary is, at most, a first-line supervisor of non-professional employees.

Beyond the decision of the director, the record is not persuasive in demonstrating that the foreign and U.S. entities are qualifying organizations. *See* 8 C.F.R. § 214.2(l)(1)(ii)G). The petitioner asserted in its petition that the U.S. company is a wholly-owned subsidiary of a foreign company. However, the petitioner's 1999, 2000, and 2001 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, indicate that the beneficiary owns 100 percent of the petitioner's common stock. This discrepancy seriously undermines the petitioner's claim that it is a subsidiary of a foreign organization. Again, 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).

In addition, the record does not contain sufficient evidence of the beneficiary's employment for a foreign entity. The petitioner indicates that the beneficiary worked for a Japanese affiliate of the claimed foreign entity, prior to entering the United States as a nonimmigrant. However, not only is there contradictory evidence regarding an actual qualifying relationship between the petitioner and the Chinese foreign entity, the record does not substantiate the claimed parent company's affiliation with the Japanese entity, the beneficiary's employer prior to entering the United States as a nonimmigrant. Further, the petitioner has not provided sufficient detail demonstrating that the beneficiary's assignment for the foreign entity was primarily managerial or executive. For these additional reasons, the petition may not be approved.

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 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.