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U.S. Citizenship and Immigration Services

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File: WAC 03 209 51075 Office: CALIFORNIA SERVICE CENTER Date:

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, Director
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 petition seeking to extend the employment of its vice 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 California that is engaged in the import and distribution of artificial flowers. The petitioner claims that it is the subsidiary of [redacted] located in Guangdong, China. The beneficiary was previously granted L-1A classification for a three-year period and the petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's findings and asserts that the petitioner has been employed in a qualifying managerial 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.

(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 issue in the present matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

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.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

1. He assists the president in planning, developing and establishing policies and objectives of the company's business in international trade activities and distribution.
2. He submits long-term and short-term business plans to the president. He directs the subordinates to establish their own responsibilities.
3. He reviews marketing reports and financial reports to ensure that the company's objectives are achieved.
4. He directs market research and finalizes marketing plans.
5. He directs to establish quality assurance system and reviews quality reports.
6. He attends major business negotiations to establish strategic relationship with the U.S. business partners.
7. He analyzes operations to evaluate company's performance and to determine areas of cost reduction and program improvement.
8. He directs financial and budget activities to fund operations and increase efficiency.
9. He submits reports to the president concerning company's performance and business opportunities.

In support of the petition, the petitioner submitted an organizational chart showing that the beneficiary supervises four subordinates including a warehouse manager, customer service support person, bookkeeper and quality control engineer. The petitioner provided a brief job description and salary information for each employee.

On September 24, 2003, the director requested additional evidence. Specifically, the director requested a more detailed and specific description of the beneficiary's duties; a detailed description of the quality control engineer's duties; and copies of the petitioner's California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports for all employees for the last two quarters.

In response, counsel for the petitioner submitted a letter dated December 1, 2003, which provides the same job description quoted above. Referring to the nine job duties listed, counsel indicated that the beneficiary's working time is allocated as follows:

- Duty 1 5%
- Duty 2 10%
- Duty 3 20%
- Duty 4 10%
- Duty 5 10%
- Duty 6 20%
- Duty 7 10%
- Duty 8 10%
- Duty 9 5%

The petitioner also submitted the requested job description for its quality control engineer, and its most recent Forms DE-6, which show that the petitioner employed the six employees listed on its organizational chart at the time of filing the petition to extend the beneficiary's status.

On December 12, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, noting that the petitioner did not provide a sufficiently detailed description of the beneficiary's actual duties. The director further noted that the beneficiary's duties would largely comprise supervision of non-professionals or directly providing the services of the business. Finally, the director noted that the petitioning entity does not possess the organizational complexity to warrant an executive position.

On appeal, counsel for the petitioner asserts that the beneficiary has been serving in a primarily managerial capacity and that the director placed undue emphasis on the number of employees supervised without taking into account the reasonable needs of the organization. Counsel asserts that on a daily basis, the beneficiary has been and will be "working out business plans and directing market research activities, financial activities, and quality control activities," and provides the following account of the beneficiary's typical day:

> At 9:00 am, he starts his work. He reviews faxes and letters. He assigns employees to handle some urgent matters. Then he holds a short day-to-day meeting with his supervisees, briefly reviewing ongoing business and assigning new tasks.
>
> At 9:30 am, he makes telephone calls and holds business discussion with outside professional services, such as CPA and bank.
>
> At 11:00 am, he starts to prepare a report, which is to be submitted to the president.
>
> At 12:00 am [sic], he goes for appointed business lunch.
>
> At 1:30 pm, he is back from lunch. He continues to write the report.
>
> At 2:00 pm, he puts aside the report and goes for a negotiation with visiting business partner.
>
> At 4:00 pm, his supervisees come to his office to report business matters that occurred during the day. He holds a discussion with them and gives them instructions.
>
> At 5:00 pm, the time in China is 9:00 am. He makes phone calls to the parent company.
>
> Around 6:10 pm, he finishes his office work and drives back home. At home in the night, he continues to make phone calls to China for business matters.

Counsel concludes that these duties are characteristic of duties performed by a manager or executive, and that the petitioner has a reasonable need to retain the beneficiary's services in the position of vice president.

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 to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* 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).

The duties listed in the letter accompanying the initial petition, which were repeated in response to the request for evidence, are too broad and nonspecific to convey an understanding of the beneficiary's proposed daily responsibilities. For instance, the job description uses general terms such as "directs market research," "directs financial and budget activities," "analyzes operations," and "attends major business negotiations." The petitioner did not, however, clarify who is actually responsible for performing routine financial and budget activities or conducting market research activities, nor did it describe what duties are involved in "analyzing operations" or explain what constitutes a "major business negotiation." Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS,* 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally, Republic of Transkei v. INS*, 823 F.2d 175 (D.C. Cir. 1991)(discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, specifics are 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.

Moreover, the petitioner describes the beneficiary as spending a full 30 percent of his time reviewing marketing reports, directing market research and finalizing marketing plans, but does not describe how these duties are managerial. In addition, the petitioner does not claim to have anyone on its staff who is responsible for preparing market reports, conducting market research or otherwise contributing to marketing plans. It is therefore reasonable to conclude that the beneficiary is solely responsible for the petitioner's marketing function, which would necessarily require him to directly perform all of the non-managerial and non-executive duties associated with the function. In addition, as mentioned above, the petitioner also describes the beneficiary as allocating 20 percent of his time "attending major business negotiations" and "establishing strategic relationships," but without more information or specific examples of the types of negotiations conducted or the nature of contracts awarded, the AAO cannot distinguish these claimed duties from routine sales activities. Further, while the petitioner employs a customer service support person who "takes orders," it is not clear that anyone other than the beneficiary is involved in meeting with clients to generate the orders. Since the beneficiary actually negotiates sales contracts and markets the petitioner's products, these duties, which appear to require 50 percent of his time, will not be considered managerial or executive in nature. 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 593, 604 (Comm. 1988).

Contrary to counsel's assertions on appeal, the petitioner has not demonstrated that the beneficiary will supervise a subordinate staff of professional, managerial or supervisory personnel who can relieve him from performing non-qualifying duties. *See* section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term professional 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 "professional" 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 a 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the work of a bookkeeper, warehouse manager or customer service support worker. While the petitioner has designated its other employee as a "quality control engineer," it has not established that the position is in fact professional. Even if this particular position were professional, the petitioner has stated that the beneficiary spends approximately ten percent of his time supervising quality control matters and therefore could not be considered to be primarily supervising professional personnel.

The AAO acknowledges that counsel has provided a new description of the beneficiary's daily responsibilities which differs from previously submitted descriptions. The new description indicates that the beneficiary spends more time on supervision of subordinate staff and reporting to the president and the foreign parent company, and less time on marketing duties. However, on appeal, 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 he associated job responsibilities. 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 CIS requirements. *See Matter of Izummi,* 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Under the circumstances, the AAO need not and does not consider the sufficiency of the amended job description submitted on appeal.

Finally, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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). 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. The AAO notes that the beneficiary was initially transferred to the U.S. to serve as the company's president in 2000 and the petitioner subsequently filed an L-1A petition for a second president, who appears to have been working in this capacity since at least the beginning of 2002. In the present matter, the petitioner has not explained why a company with six employees requires the services of two L-1A managers/executives, or explained how

the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity. 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.