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U.S. Citizenship
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Services

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MAY 04 2005

File: WAC-04-016-50325 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[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, 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 Chief Executive Officer (CEO) 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 Delaware that operates as a seller and marketer of computer software. The petitioner claims that it is the subsidiary of CTI^2, Ltd., located in Israel. The beneficiary was initially approved for L-1 status 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 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 asserts that the beneficiary will be employed in an executive capacity. Counsel further asserts that the director failed to request all pertinent evidence in his request for evidence; and that the petitioner provided all documentation that the director did request. In support of these assertions, counsel submits a brief, additional evidence, and previously submitted documents.

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 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.

In a letter filed with the initial petition on October 22, 2003, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] directs the management of the entire organization and establishes the goals and policies of [the petitioner]. In fulfilling this role, [the beneficiary] continues to exercise wide latitude in his decision-making and receives only general supervision from the [petitioner's] Board of Directors.

Upon his relocation, [the beneficiary] has become directly responsible for expanding the company's United States operations. [The beneficiary's] specific duties include, but are not limited to, the following:

- Planning business objectives, developing organizational policies and establishing responsibilities and procedures for attaining objectives in the United States;
- Directing and coordinating the promotion of CTI in the United States in order to maintain and further develop the company's standing in the industry;
- Overseeing the recruitment and training of U.S. candidates to serve as business development, marketing, sales and financial officers of the company;
- Negotiating and developing strategic partnerships with United States based technology companies;
- Maintaining and strengthening the operational logistics with the world wide research operations of the company;
- Providing management direction, goals and policies for [the foreign entity's] United States based professional employees;
- Supervising all U.S. subcontractors partnership agreements, licensing operations and research collaboration agreements.

[The beneficiary] directly supervises the work of the senior managers of the firm including:

Senior Manager	Department
[redacted]	CoFounder, VP R&D and CTO
	VP Administration and CFO
	VP Operations
	VP Sales & Business Development
	VP Marketing & Product Management

Through his senior managers [the beneficiary] directs the work of the entire staff of [the petitioner's family of companies] . . . . In this position [the beneficiary] retains authority over the entire worldwide operations of the firm and its professional employees. [The beneficiary] will continue to report to the Board of directors of [the petitioner].

On November 3, 2003, the director requested additional evidence. Specifically, the director requested:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels.

> The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties for each employee.
>
> - Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage and Withholding Report for all employees for the last 4 quarters that were accepted by the State of California. The forms should include the names, social security numbers, and number of weeks worked for all employees . . . .
>
> There are only two W-2's submitted for the petitioner's location, (CA), and only one of these appear[s] to be in the commuting area of the petitioner. Please explain.
>
> - Payroll Summary: Submit copies of the U.S. company's payroll summary, W-2's and W-3's evidencing wages paid to employees.

In a response dated November 27, 2003, the petitioner submitted: (1) an illegible document titled "CTI^2 – Company Structure" that appears to be an organizational chart; (2) a document that provides job descriptions for the beneficiary and the five officers that are purported to be his subordinates; (3) copies of the petitioner's California Forms DE-6, Quarterly Wage and Withholding Report, for the fourth quarter of 2002, and the first, second, and third quarters of 2003; (4) copies of the petitioner's 2002 IRS Form W-3 and Forms W-2; and (5) a letter addressing the director's concerns as follows:

> We respectfully submit . . . the most current Executive Organizational Chart for CTI Squared, Inc., evidencing the five executive Vice Presidents of the global organization that [the beneficiary] directly oversees, and the number of employees in each of these Vice Presidents' departments . . . .
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> * * *
>
> One of the W-2's in question was for an employee who is a Sales Representative who is based outside of California. There were only two submitted in the original petition, because the company only employed two United States employees at that time.

On December 11, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that the petitioner failed to provide its organizational chart in response to the request for evidence. The director noted that the petitioner's Forms DE-6 reflect that it employees three individuals including the beneficiary, two of which possess executive titles. The director stated that "[t]here is no description of the duties performed by the additional employee and there is no evidence or mention of subordinate employees to perform non-executive or non-managerial duties for the

petitioner." The director noted that "[f]rom the evidence submitted it appears that the beneficiary will be involved in substantially all aspects of the actual day to day duties rather than directing activities through managers, executives, or other professionals."

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity. Counsel claims that the director erred in denying the petition based on a finding that the beneficiary would not be employed in a primarily managerial or executive capacity, due to the fact that the director failed to request evidence of such in the request for evidence. Counsel asserts that the request for evidence did "not present any indication that the Service Center [was] questioning the **beneficiary's eligibility**." (Emphasis in original.) Counsel claims that the request for evidence was limited to documentation "relating to the US company." Counsel states that "the denial was based on a reason that was never brought to [the petitioner's] attention," and thus the decision amounts to an abuse of discretion. Counsel cites the Adjudicator's Field Manual and an unpublished AAO decision to stand for the proposition that the director had an obligation to specifically request documentation regarding the beneficiary's eligibility.

Counsel further asserts that, contrary to the director's comment, the petitioner provided an organizational chart. Counsel indicates that the chart provided is global, and thus covers the petitioner as well as the foreign entity. Counsel comments on the job descriptions for the beneficiary's subordinates, stating that "under Vice President Raanan Peleg's description, it states that he is in the United States. In addition it states that he has an MBA, professional degree. We kept our employee descriptions limited to the beneficiary's Direct Subordinates, because it is only these individuals that he directly oversees."

Counsel takes issue with the director's statement that "[f]rom the evidence submitted it appears that the beneficiary will be involved in substantially all aspects of the actual day to day duties rather than directing activities through managers, executives, or other professionals." Counsel asserts that the provided job description for the beneficiary contains "no assertion relating to this premise." Counsel further states that:

> Neither the . . . job description nor any of the exhibits submitted make it "**appear**" that [the beneficiary] will no longer work in his currently approved L-1A CEO position. It is important to note that only the Board of Directors is above [the beneficiary] in the Corporate hierarchy and his executive leadership over the entire organization and especially his executive staff of Vice Presidents (each overseeing a specific worldwide department) only strengthens his executive position.

(Emphasis in original.)

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 beneficiary's job description submitted by the petitioner does not establish that he will be employed in the United States in a primarily managerial or executive capacity. The petitioner states that the beneficiary will be responsible for "[p]lanning business objectives, developing organizational policies and establishing responsibilities and procedures for attaining objectives in the United States," yet this general statement provides little insight into the true nature of the tasks the beneficiary will perform. The petitioner indicates that the beneficiary will "[direct] and coordinate[e] the promotion of [the petitioner] in the United States in order to maintain and further develop the company's standing in the industry," yet without further explanation, this appears to be a non-qualifying sales and marketing task. The petitioner provides that its vice president sales & business development is located in the United States, yet the brief and vague job description submitted for this employee is not sufficient to show what his precise duties will be. Thus, the petitioner has failed to sufficiently explain who will actually carry out the day-to-day sales activities, and the evidence of record suggests that the beneficiary will play a central role in doing so. 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). While the petitioner states that the beneficiary will "[oversee] the recruitment and training of U.S. candidates to serve as business development, marketing, sales and financial officers of the company," the petitioner's future hiring plans are not probative of the petitioner's eligibility as of the date of filing the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner states that the beneficiary will be responsible for "[s]upervising all U.S. subcontractors partnership agreements," yet the record contains no evidence of U.S. subcontractors that provide services to the petitioner. Again, 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. at 190. Thus, the beneficiary's job description does not provide sufficient detail to establish that he will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(ii). 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). The actual duties themselves reveal the true nature of the employment. *Id.*

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-qualifying. As discussed above, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks. Some of the beneficiary's duties are not sufficiently explained to establish that they are managerial or executive tasks. While it appears that the beneficiary will perform some duties of a managerial or executive nature, the petitioner fails to quantify the time the beneficiary spends on his respective tasks. For this reason, the AAO cannot determine whether the beneficiary is primarily performing managerial or executive duties.

The petitioner indicates that the beneficiary will "[provide] management direction, goals and policies for [the foreign entity's] United States based professional employees." The petitioner provides that that beneficiary will have supervisory authority over subordinate employees in the United States, including a vice president sales & business development and a sales representative. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a 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 states that the vice president sales & business development completed a bachelor's degree in industrial engineering. Yet, the petitioner has failed to sufficiently describe his duties such that the AAO can determine if academic training in industrial engineering is necessary to successfully perform his tasks. The petitioner failed to document the education or duties of the sales representative. Thus, the petitioner has not established that the beneficiary manages professional subordinates in the United States.

The job description for the vice president sales & business development states that he "is responsible with his sales team for sales." Yet, the petitioner has failed to provided a sufficiently detailed description of his duties such that the AAO can determine whether he supervises the other members of the sales team, and if so, whether such supervisory activities require a significant portion of his time. Thus, the petitioner has not established that the vice president is a supervisory employee. Nor has the petitioner shown that the sales representative supervises subordinate staff members. Further, the petitioner has failed to adequately describe the vice president's and sales representative's duties such to establish that they manage a clearly defined department or function of the petitioner. The evidence of record does not reflect that they are in fact managerial employees. Accordingly, the petitioner has not shown that the beneficiary's United States subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel claims that the director's request for evidence was limited to documentation "relating to the US company," and that the director erred in not specifically requesting evidence of the beneficiary's employment capacity. Upon review, the AAO finds that the director did request evidence that is probative of whether the

beneficiary will be employed in a primarily managerial or executive capacity. For example, the director requested "copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage and Withholding Report for all employees for the last 4 quarters . . . includ[ing] the names, social security numbers, and number of weeks worked for all employees." The director requested the petitioner's payroll data and clarification regarding the location of its claimed employees. The director requested a detailed organizational chart of the petitioner, showing the beneficiary's position and all subordinates under his direction, as well as position descriptions for all of the petitioner's employees. These inquiries would reflect what workers the petitioner employs, such that Citizenship and Immigration Services (CIS) can determine who are the beneficiary's subordinates in the United States. This information has a direct bearing on the beneficiary's duties and managerial responsibilities. It is necessary to develop an understanding of the duties of all of the petitioner's employees in order to determine what are the beneficiary's actual tasks. Thus, contrary to counsel's assertion, the director clearly and appropriately requested evidence that indicates that the beneficiary's employment capacity was at issue.

Further, also contrary to counsel's assertion, the petitioner failed to fully respond to the director's requests. The petitioner provided a document titled "CTI^2 – Company Structure," that appears to be an organizational chart. Yet, the version submitted in response to the director's request is almost entirely illegible. Thus, the director did not have an acceptable organizational chart to consider in making his decision, and he correctly noted that the petitioner failed to satisfy the request for a detailed chart. The petitioner now submits a legible version of the same chart on appeal. Upon review, it is noted that this chart also fails to address the director's request. The director clearly requested "a copy of the U.S. company's line and block organizational chart." Yet, the chart submitted depicts the petitioner as single block among other divisions of the global company, without identifying any subdivisions or the management structure of the petitioner. The director instructed the petitioner to "[c]learly identify the beneficiary's position in the chart and list <u>all</u> employees under the beneficiary's supervision by name and job title," yet the chart fails to name all individuals employed in the United States or to provide their titles. The director requested "a brief description of job duties for each employee" in the United States. Yet, while the petitioner provided job descriptions for the beneficiary and the vice president sales & business development, it failed to submit the duties of the third claimed employee. Counsel states that "[w]e kept our employee descriptions limited to the beneficiary's Direct Subordinates, because it is only these individuals that he directly oversees." Yet, this reasoning does not relieve the petitioner from the obligation to fully respond to the director's requests.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Counsel cites an unpublished AAO decision to stand for the proposition that the director had an obligation to specifically request documentation regarding the beneficiary's eligibility. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel states that it is unclear what evidence the director referred to in stating his conclusions. Yet, the director's decision cites numerous documents in the record to support his findings, including the job description for the beneficiary, the petitioner's description of its operations, the organizational chart, the petitioner's Forms DE-6, and the petitioner's Forms W-2. The director appropriately examined the beneficiary's job description, and looked behind the description to the petitioner's evidence in forming his decision.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

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 met this burden.

ORDER: The appeal is dismissed.