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File: WAC 03 227 50237 Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2005

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 appeal will be sustained. The AAO will withdraw the decision of the director and approve the petition.

The petitioner filed this nonimmigrant petition seeking to extend the employment of the beneficiary 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 vineyard and winery located in California, claims to be the parent company of the beneficiary's previous foreign employer, [REDACTED], located in Casablanca Valley, Chile. The beneficiary was initially granted a three-year period of stay in L-1A status to serve as facilities manager for one of the petitioner's California wineries. The petitioner now seeks to extend the beneficiary's stay so that he may serve in the position of director of sales and marketing for the petitioner's [REDACTED] brand for a two-year period.

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 under the extended petition.

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 director erred by denying the petition solely on the basis that the beneficiary will not directly supervise supervisory, managerial or professional employees. Counsel asserts that the beneficiary qualifies as a function manager, as he manages an essential function, exercises discretionary decision-making authority with respect to that function, and functions at a senior level within the petitioner's organizational hierarchy and with respect to the function managed. Counsel submits a brief and additional evidence in support of the appeal.

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(1)(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 (I)(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 capacity under the extended petition, specifically as a "function manager."

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.

In a July 30, 2003 letter appended to the initial petition, the petitioner indicated that the beneficiary will be responsible for developing and executing marketing strategies for the Veramonte brand, and included a detailed description of the his proposed responsibilities. The petitioner noted that gross sales of Veramonte wines were projected to exceed \$10 million in 2003.

The petitioner also submitted a separate position description for the beneficiary's proposed position that outlines the position's scope, key responsibilities, key relationships and requirements. This description included, in part, the following additional information:

- This position requires that the employee provide leadership, brand strategy, pricing, promotion and sales planning for the Veramonte brand for both the domestic and international marketplace.

- This position requires the employee to provide leadership to ancillary marketing groups and sales force.
- The employee is responsible for working with the "Food and Wine Council of Chile" to promote Chilean wines and the image of Chilean wines in the United States.
- This position is responsible for Handling the Marketing Planning Calendar and Activities in accordance with the [petitioner's] Business Plan.
- The position is responsible for the development and implementation of the Veramonte Inventory Workout Plan.
- Due to the leadership nature of this role, strong interpersonal skills and the ability to motivate subordinates, cross-functional teams, peers and superiors are vital to the success of the individual. Strong people management skills are vital to success in this position . . . .

The petitioner indicated that the beneficiary will report to the senior vice president for marketing and will have "key relationships" with the chairman of Veramonte, the president and chief executive officer, the vice president for national sales, the hospitality manager, the Veramonte winemaker, operations manager, the executive team, the petitioner's sales, marketing and creative teams, and key winery association leaders.

On August 8, 2003, the director requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive under the extended petition. In part, the director requested: (1) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, listing all employees under the beneficiary's supervision by name and job title, and including the job duties, educational level, annual salaries and immigration status for all employees the beneficiary supervises; and (2) a more detailed description of the beneficiary's duties, the percentage of time he spends on each duty, and a list of all employees who work under the beneficiary's direction.

In a response received on September 23, 2003, the petitioner submitted an organizational chart depicting the organization of the petitioner's brand management and creative services division, which shows that the beneficiary will report to the senior vice president of marketing, who in turn reports to the president and chief executive officer. The petitioner also re-submitted the job description submitted with the initial petition, but assigned a percentage to convey the amount of time the beneficiary devotes to each listed duty. Counsel for the petitioner emphasized in her response letter that the beneficiary is a function manager as contemplated by the regulations and will not directly supervise other employees. Counsel further explained as follows:

[T]he position of Director of Sales and Marketing for Veramonte Wines exercises leadership responsibility and discretionary decision-making authority with respect to an essential function of the organization, namely the sales and marketing of one of its premier fine wines, Veramonte.

Moreover, [the beneficiary] functions at a senior level with respect to the function managed and within the organization. As Director of Sales and Marketing, he is responsible for developing and directly [sic] marketing and brand strategies for the Veramonte Wines in support of the corporate growth and profit targets. In his leadership capacity, he is responsible for all aspects of the sales and marketing of Veramonte, including pricing and promotion, and

will professionally represent Veramonte at sales meetings, association meetings, distributor presentations and consumer events. In addition, [the beneficiary] is responsible for creating and implementing and controlling the national marketing budget for Veramonte. The 2003 budget is \$358,500, and [the beneficiary] oversees and directs how the budget is expended . . . [The beneficiary] reports directly to the Senior Vice President/Marketing, a member of [the petitioner's] Executive Staff.

On October 3, 2003, the director denied the petition. The director determined the petitioner had not provided sufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The director noted that since the petitioner did not provide the requested information with respect to the beneficiary's subordinates, "it appears the beneficiary will be performing practically all of the day-to-day operations and the tasks necessary to produce a product or provide services." The director further noted that a preponderance of the beneficiary's duties will be directly providing the services of the function, that the petitioner had not shown that the beneficiary would be functioning at a senior level within an organizational hierarchy, and that the petitioner's evidence does not establish that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel to relieve him from performing non-qualifying duties.

On appeal, counsel states that the petitioner misinterpreted the documentation required in response to the request for evidence and reiterates that the beneficiary is a function manager and need not directly supervise managerial, professional or supervisory employees in order to qualify for the benefit sought. The petitioner submits on appeal additional organizational charts evidencing the management structure of its sales division, marketing organization, finance organization, and sales operation division. The petitioner also submits a functional flow chart depicting the beneficiary's relationships with various internal divisions with respect to the brand he manages. Counsel provides a detailed explanation regarding the beneficiary's authority and indirect oversight of other divisions within the scope of his assigned function:

As Director of Sales and Marketing for Veramonte Wines, [the beneficiary] exercises leadership responsibility and discretionary decision-making authority with respect to an essential function of [the petitioner], namely the sales and marketing of its brand of fine Chilean wines, Veramonte. . .

[The beneficiary] does not directly or solely supervise and control the work of other supervisory, professional or managerial employees. Instead, as a functional manger [sic], he directs, oversees and coordinates the efforts of numerous departments and divisions at [the petitioner] to ensure that marketing strategies for Veramonte are properly developed, budgeted and executed.

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[H]e directs, oversees and coordinates the efforts of a number of individuals in a number of departments, who clearly relieve him from the day-to-day duties while maintaining discretion over them. The Sales Division implements the marketing strategy he has developed. The Creative and Merchandising Services Department works with [the beneficiary] to develop

promotions, collateral materials and points of sale. In cooperation with [the beneficiary], the Hospitality Department coordinates events, and the Director of Public Relations focuses media attention on Chilean wines as part of [the beneficiary's] strategic plan.

Counsel asserts that the petitioner has established that that the beneficiary manages an essential function, operates at a senior level within the petitioner's organizational hierarchy and with respect to the function managed, and exercises discretion over the day-to-day operation of that function by directing, overseeing and coordinating the efforts of other employees.

In addition, the petitioner submits the beneficiary's 2002 Form W-2, Wage and Tax Statement, evidencing that the beneficiary received total compensation of \$345,678.91 from the petitioner, including a base salary of \$140,000, bonuses and incentives. Finally, in support of the claimed organizational structure, the petitioner submitted an "Employee Status Report" which confirms that the petitioner had 703 permanent and seasonal employees as of November 2003.

Upon review of the petition and the evidence on record, the petitioner has established that the beneficiary will be employed in a managerial capacity under the extended petition. Accordingly, the decision of the director dated May 21, 2003 will be withdrawn and the petition will be approved.

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. The term "essential" is commonly defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, based on the plain meaning of the word "essential," the petitioner must establish that the function managed by the beneficiary is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

Based on the statutory definition of managerial capacity, a petitioner must prove the following elements to establish that a beneficiary is primarily serving as a function manager within an organization:

First, the beneficiary must manage an "essential function" within the organization, or a department or subdivision of the organization;

Second, the beneficiary must function at a "senior level" within the organizational hierarchy or with respect to the function managed; and

Third, the beneficiary must control and "exercise discretion" over the day-to-day operations of the function.

*See* sections 101(a)(44)(A)(ii), (iii), and (iv) of the Act.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a written job offer that clearly describes

the duties to be performed in that capacity, 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. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the AAO cannot determine whether 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). In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *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. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988); see also, *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at \*5 (9th Cir. 1995 (unpublished))(citing to *Matter of Church Scientology Int'l*. and finding an employee who primarily performs operational tasks is not a managerial or executive employee).

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

In this matter, upon review of the totality of the record, the petitioner has established that the beneficiary is primarily serving as a function manager. First, the AAO is satisfied that the beneficiary's role within the organization is that of a senior-level manager responsible for the management of an "essential function," specifically, the marketing, sales, and brand management of a product line that produces millions of dollars in revenue for the petitioner annually. The petitioner in this case derives its income from the production, marketing, sales, and distribution of approximately six wine brands. Within the scope of the petitioner's business, it is clear that the function of managing the sales, marketing, and brand image of one of its brands is an "inherent" or "indispensable" function, and therefore, an "essential" function as required by the plain language of the statute.

Second, the petitioner has established that the beneficiary functions at a "senior level" within the organizational hierarchy and with respect to the function managed. In performing his daily activities, the beneficiary will report directly to the senior vice president of marketing and indirectly to the petitioner's president, while working closely with other employees primarily at the executive and managerial level. In a company with 500 permanent employees and a multi-layered managerial structure, his position can clearly be considered senior within the company's complex organizational management hierarchy. Further, the petitioner has established that the beneficiary occupies the senior position with respect to management of the Veramonte brand, with accountability for overseeing marketing programs, controlling costs, and monitoring production and sales performance for one of the petitioner's key product lines.

Third, the petitioner has established that the beneficiary "exercises discretion" over the day-to-day operations of the function in that he controls a broad range of activities associated with management of his assigned product line. Beyond sales and marketing activities, the beneficiary's authority includes the allocation and control of a significant budget and authority to influence decisions made by the management of the vineyard that produces the wine.

Finally, although the director concluded that the beneficiary would primarily be performing sales and marketing duties, the petitioner has submitted sufficient evidence to establish that it maintains a large staff of sales, marketing, creative and financial personnel who would perform the routine duties associated with marketing, advertising and selling the brand managed by the beneficiary, leaving the beneficiary free to primarily engage in developing policies and goals and overseeing execution of long-term strategies. The AAO is satisfied that the beneficiary primarily manages, rather than performs, the function.

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, the petitioner has sustained that burden. For the foregoing reasons the decision of the director will be withdrawn and the petition will be approved.

**ORDER:** The appeal is sustained.