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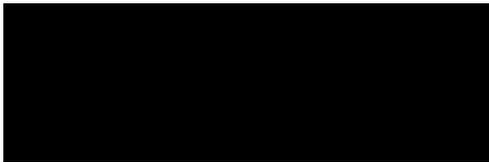
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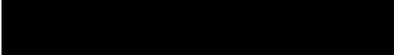
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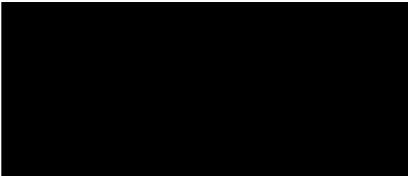


FILE: WAC 03 139 51192 Office: CALIFORNIA SERVICE CENTER Date: **JUN 28 2005**

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)

ON 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  
*b*

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2001 and claims to be in the business of "helping Japanese companies and individuals enter the U.S. market." The petitioner claims to be a subsidiary of the [REDACTED] located in Kyoto, Japan. It declares one employee and gross sales of \$50,000.00. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as president and chief executive officer for five years, at an annual salary of \$48,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 serves 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(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in a 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.

The petitioner initially stated in the petition that the beneficiary would be responsible for establishing activities in the United States, broadening the petitioner's business connections, and establishing the U.S. entity as planned.

In a letter of support, dated March 25, 2003, the petitioner described the beneficiary's duties in part as:

[The beneficiary] has developed and currently oversees support services for Japanese companies entering the U.S. market. As part of this function, he plans and develops websites for our clients. He also coordinates, plans, and leads business inspection tours to allow our clients to learn American business practices. He developed and continues to lead our service to assist families to develop plans to studies abroad. [sic] Back office support services continue to be provided by the [foreign entity] in Japan . . . .

In response to the director's request for additional evidence, the petitioner described the beneficiary's duties in part:

Researching U.S. companies and products to find possible vendors and partners; planning, contact and arranging inspection tours and early stage negotiations; planning and developing web-sites, etc . . . .

The petitioner listed the beneficiary's job duties as well as the percentage of time to be spent performing each duty as:

1. 10% Research and analyze trends in U.S.-Japanese business to establish company focus and policies, and to plan future growth of [the U.S. entity].

2. 2.5% Implement accounting systems and plan for cash flow and currency fluctuations while coordinating with [REDACTED] CFO, Corporate Development Advisor and Accounting Officer to ensure integrity and harmony with other part of [REDACTED]
3. 2.5% Prepare business analysis and report to [REDACTED] president on progress.
4. 5% Work with Japanese businesses to clarify goals and needs during the early stages of entering the U.S. market.
5. 10% Research, report to Japanese companies and advise on U.S. vendors' potential, characteristics and trends in support of U.S.-Japanese business alliances, to allow Japanese companies to benefit from the opening of the Japanese market to international competition by linking with U.S. vendors.
6. 5% Research U.S. distributors and corporate buyers to find opportunities for Japanese companies in America.
7. 15% Perform liaison between U.S. and Japanese companies to begin the process of making alliances with American and other international companies.
8. 5% Develop and oversee support services (real estate, accounting, legal, etc., -- 'business incubation') for Japanese companies entering the U.S. market.
9. 5% Plan and develop websites, or coordinate provision of outsourced web development and management.
10. 10% Plan, coordinate and lead business inspection tours to allow clients to learn American business practices and begin relationship building.
11. 20% Plan, develop and lead services for families planning to send children or young people for studies abroad.
12. 5% Supervise back office support services, making use of [REDACTED] core office staff as well as dedicated customer service staff.
13. 5% Hire (& fire), set compensation levels, train and manage customer service staff.

The petitioner also stated that the beneficiary's position has been primarily executive in nature, that the beneficiary works under the general supervision of the foreign entity, and that he has full discretion to make necessary business decisions. The petitioner stated that the beneficiary's managerial duties as described (8 through 13) allow him full discretion to manage the organization on a day-to-day basis and to supervise the work of others, including "outsourced service providers."

The petitioner listed services offered by the U.S. entity to Japanese families to include:

- a. Finding schools and support programs corresponding to the individualized needs of the families.

- b. Finding home-stay arrangements.
- c. Dealing with emergent issues, problem-solving, and on-going changes in goals of family members.

The petitioner submitted a company organizational chart, which depicted the beneficiary as president and chief executive officer of the U.S. entity, with a "CFO," corporate development adviser, and three customer service representatives under his direction. The chart described the subordinate positions as: CFO - managing finance of [REDACTED] Corporate development adviser - communicating with clients; and Customer service representatives - locations are the Kanto area, Kyushu area, and Kansai area. The petitioner also submitted copies of the U.S. entity's Articles of Incorporation, IRS Form 1120, Corporate Income Tax Return for 2002, a company business plan, and an unaudited financial statement for the year 2002.

The director subsequently denied the petition. The director stated that there had been insufficient evidence submitted to establish that the beneficiary would be performing executive or managerial duties. The director noted that there had been no evidence submitted to demonstrate that the beneficiary would be working through others to achieve organizational goals. The director also noted that although the petitioner claimed to employ five subordinates, it failed to submit any IRS W-2 Forms or IRS DE-6 Forms to substantiate its claim. The director further noted that the beneficiary had been the sole employee of the U.S. entity since it was established in 2001. The director concluded by stating that a review of the evidence of record failed to establish that the beneficiary had a support staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the director failed to consider that the beneficiary supervises employees who are located in Japan. Counsel also asserts that the beneficiary is a functional manager in that he manages the operation of both the business and educational support programs. Counsel contends that the U.S. entity utilizes the services of outside contractors rather than salaried employees. Counsel further contends that the beneficiary's executive role consists of planning the development of the company by "planning for financial growth, services offered, pricing, etc." Counsel concludes by asserting that the beneficiary operates the U.S. entity with full independence.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial in nature. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In the instant matter, the petitioner has failed to distinguish the beneficiary's role in the operation of its business. For example, the petitioner describes the beneficiary's duties as managerial in that he supervises support staff, and executive in that "he has full discretion to make necessary business decisions." Further, 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 (9<sup>th</sup> Cir. July 30, 1991). In the instant matter, the record shows that the beneficiary was the sole employee of

the U.S. entity at the time the petition was filed. There is insufficient evidence to show that any of these foreign employees actually perform the day-to-day non-qualifying duties of the U.S. entity. Consequently, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include researching U.S. companies and products, planning and negotiating contracts, and developing web sites. The petitioner did not, however, define the early stage negotiations or the web-site development process; nor did the petitioner clarify the research or planning processes. 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*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary's responsibilities as: marketing the petitioner's services to Japanese businesses and families, leading business inspection tours, developing web sites, researching United States and Japanese business trends, and participating in the negotiating processes. Since the beneficiary actually conducts the research, performs technical work, sells the services, negotiates the contracts, and markets the petitioner's services, he is performing tasks necessary to provide a service or product and this duty cannot 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 Dec. 593, 604 (Comm. 1988).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In the instant matter, counsel claims that the beneficiary supervises five subordinate staff members who provide the necessary support services for the operation of the U.S. entity. Contrary to counsel's claim, the evidence shows that the five individuals are employed in Japan and that they perform services for the foreign entity. For example, in the staffing list the CFO is said to be the president of the foreign entity, and the corporate development advisor is listed as the director of the foreign entity. In addition, it appears from the organizational chart that the three customer service representatives service their individual regions in Japan. Furthermore, the petitioner indicated that the beneficiary spends only five percent of his time supervising "back office support services." The evidence demonstrates that the beneficiary has been the U.S. entity's sole employee since it was established in 2001. Although the petitioner asserts that the beneficiary supervises back office support staff, the evidence shows that the staff is located abroad and provides services to the foreign entity rather than the U.S. entity. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would be directing the management of the organization, establishing goals and policies, exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California, supra*. Although the petitioner stated that the beneficiary's position is primarily executive in nature, in that he performs under the general supervision of the

foreign entity and has full discretion to make necessary business decisions, there has been no evidence submitted to substantiate its claim. 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*, *id.* Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Contrary to the petitioner's contention, it appears that the beneficiary's duties will primarily consist of researching business opportunities, marketing the organization's services, conducting business tours, providing housing and educational placement services to Japanese families, and developing web sites for the company. In addition, the record fails to demonstrate that the U.S. entity has developed to a point where it is able to support the services of an executive.

On appeal, counsel contends the beneficiary is a functional manager. 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. 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). In this matter, counsel asserts that the beneficiary is a functional manager in that he manages the company's business and educational support programs. Contrary to counsel's contentions, the record demonstrates that the beneficiary actually performs the functions necessary to maintain the support programs. For example the record shows that the U.S. entity provides services to assist Japanese families in finding schools, social support programs, and housing; and to resolve any conflicts that may arise. There is no evidence in the record to show that there is anyone besides the beneficiary to perform such duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further contends that the U.S. entity utilizes the services of outside contractors rather than salaried employees in the operation of its business and educational support programs. In the letter dated March 25, 2003, the petitioner indicated that the U.S. entity planned to rely on independent contractors to provide support services. In the company business plan, the petitioner indicated that it receives legal advice from an attorney concerning immigration issues, and accounting advice from a public accountants group concerning financial matters. The petitioner has neither presented evidence to document the existence of these employees nor has the petitioner shown to what extent the beneficiary will supervise their activities. Nor has the petitioner identified whether the contract employees will be employed on a full-time, part-time, or as needed basis. Additionally, the petitioner has not explained how the services of the contracted employees will obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary

evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent company's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In addition, there is insufficient evidence contained in the record to demonstrate that the foreign entity will continue doing business pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H). For these additional reasons, 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.