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File: WAC 03 246 52680 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2005**

IN RE: Petitioner: 
Beneficiary: 

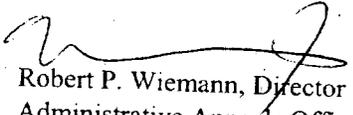
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 president and chief executive officer 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 wholesale of garments from China. The petitioner claims that it is the subsidiary of [REDACTED], located in Shanghai, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary 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 as the beneficiary supervises managerial employees and as substantially all of his duties are managerial and executive in nature, he is qualified for an extension of status. In support of these assertions, counsel submits a brief and additional evidence.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of 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 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 the initial petition, the petitioner described the beneficiary's job duties as follows in a letter dated August 20, 2003:

[P]lan and develop organization policies and implement goals through administrative personnel; coordinate activities of department to effect operational efficiency and economy; allocate operating budget, analyze department budget requests to identify areas in which reduction can be made; confer with administrative personnel, review activity, operation and sales reports to determine changes in operations required; direct preparation of directives to departmental administrators outlining policies, programs, or operation improvements; and hire, fire and train managerial employees of the Petitioner.

The petitioner also submitted an organizational chart showing that the beneficiary supervises two employees, one who is responsible for the sales department, and another who is responsible for both customer service and documentation. The chart also depicts the beneficiary as responsible for the company's administration and accounting department.

On September 9, 2003, the director requested additional evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested: (1) the total number of employees in the U.S. company; (2) a copy of the U.S. company's organizational chart listing all employees by name and job title and including a brief description of job duties, educational level and annual salaries and wages for all employees under the beneficiary's supervision; (3) Form 941, Quarterly Wage Reports for the last four quarters; (4) payroll summary, W-2s and W-3s evidencing wages paid to employees in 2002; (5) the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the last four quarters.

In response, the petitioner stated that it has three employees and submitted the requested federal and state wage reports for the first three quarters in 2003, noting that the company did not hire any employees until January 2003. The petitioner also provided a new organizational chart depicting the same organizational structure consisting of the beneficiary as both president/CEO and manager of the administration and accounting department, a sales manager, and a department manager responsible for both documentation and customer service. Also included were job descriptions for the beneficiary and the department managers. The beneficiary's job description as president/CEO was identical to the description previously provided, and the following description was provided for his concurrent role as administration and accounting department manager:

[c]oordinate activities of departments to effect operational efficiency and economy; direct preparation of directives to departmental administrator outlining policy, program or operations changes to be implemented; coordinate all employees in their working schedules; approach landlord to sign office lease and deal with related matters; approach accounting firm/CPA to arrange employees' salary, tax deduction and employer's tax payment; approach custom[s] when there are any problems in custom[s] declare, such as discrepancy in merchandise name, quality and quantity; approach; and negotiate with banks when there are any problems in payment collection.

On October 11, 2003, the director denied the petition concluding that the beneficiary's duties are not primarily managerial or executive. In his decision, the director emphasized the non-professional duties performed by the beneficiary's two subordinates, and the lack of subordinate staff in the accounting and administrative department who could relieve the beneficiary from performing non-qualifying duties related to these functions. The director therefore concluded that the U.S. entity lacks the organizational complexity to support an executive position.

On appeal, counsel for the petitioner asserts that the director erred in focusing on whether the beneficiary's subordinates are professionals and contends that his two subordinates are in fact performing managerial duties, therefore making the beneficiary more than a first-line supervisor. In support of this assertion, counsel submits a new organizational chart depicting five sales representatives reporting to the sales manager, and two to three proposed administrative assistant positions reporting to the customer service manager. Counsel explains that the sales persons are independent contractors and therefore were not included in the initial organizational chart. The petitioner submits copies of four checks allegedly paid to the sales representatives as commission in June, August and September 2003. Counsel also notes that the beneficiary, in his role as administration and accounting manager, directs an outside accountant who handles all of the company's financial and bookkeeping duties. Finally, counsel notes that the beneficiary intends to transfer administrative and financial management duties to another managerial employee in the near future, and states that "it would be unreasonable for the Service to forcibly impose a cut-off date to relinquish such duties at the exact one-year anniversary for the beneficiary to renew his status."

Upon review of the record, 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.* In this case, the petitioner states that the beneficiary is serving in both executive and managerial capacities and therefore must meet the requirements imposed by both statutory definitions.

Rather than providing a specific description of the beneficiary's duties as president/CEO, the petitioner provides only a brief, vague description that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's will "plan and develop organization policies and implement goals" and "direct preparation of directives to departmental administrators outlining policies, programs, or operation improvements." The petitioner did not, however, define the beneficiary's goals, policies or directives. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 90 (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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of providing that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F. 2d. 175, 177 (D.C. Cir. 1991). This failure of documentation is important because the job description for the beneficiary's concurrent role as manager of the petitioner's administrative and accounting department reveals that he will be performing various tasks, such as coordinating work schedules, preparing documentation for an outside accountant, resolving customs issues, and ensuring collection of payments, which do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22,24 (D.D.C. 1999).

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)(ii) of the Act. In his decision, the director determined that because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be acting in a managerial capacity. Counsel is correct in his statement that the beneficiary need not supervise professionals in order to qualify as a manager. However, contrary to counsel's contention on appeal, the petitioner has not established that the beneficiary's subordinates are managers or supervisors.

On appeal, counsel asserts that the beneficiary's subordinates are in fact managers and claims that the sales manager has been supervising a staff of five sales representatives who were not previously named because they are independent contractors. The petitioner submits a new organizational chart on appeal that lists five additional employees. However, the AAO does not accept counsel's explanation with respect to the earlier

omission of these employees from the petitioner's description of its staffing levels. In his request for evidence, the director asked the petitioner to provide a detailed organizational chart and to fully describe the duties of each employee. The job description submitted by the petitioner, which is quoted in full in the director's decision, revealed that the sales manager was actively involved in performing the sales function and listed no duties related to selection or supervision of a subordinate staff of sales representatives. In addition, the organizational chart submitted in response to the request for evidence showed no staff reporting to the sales manager. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. For the same reason, the AAO will not consider counsel's assertion on appeal that the beneficiary, in his role as accounting and administration manager, supervises a professional accountant.

A review of the job descriptions provided for the sales manager and customer service manager reveals that these employees were actively involved in performing the sales and customer services functions, rather than supervising a staff of subordinates who actually perform the day-to-day tasks associated with the function. The AAO is not persuaded that these employees are performing duties which are professional, supervisory, or managerial, regardless of counsel's attempt to create a subordinate staff for these employees on appeal, and therefore cannot find that the beneficiary manages a subordinate staff of managerial, supervisory or professional employees.

The AAO recognizes counsel's statement on appeal that the petitioner intends to hire additional staff who will report to the customer service manager, and that the beneficiary intends to transfer his financial and administrative duties to another employee in the future. However, 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).

Counsel for the petitioner notes on appeal that it is "myopic at best and arbitrary at worst" for Citizenship and Immigration Services (CIS) to "force a running business to become a full-fledged operation at exactly the one year anniversary of the beneficiary's stay in the United States as an executive." However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. As discussed above, the record does not establish that at the time the petition was filed a majority of the beneficiary's duties consisted primarily of directing the management of the organization or supervising a subordinate staff of professional, managerial or supervisory personnel. Nor has the petitioner demonstrated that at the time the petition was filed it had reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constituted significant components of the duties performed by the beneficiary. Therefore, in the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition cannot 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.