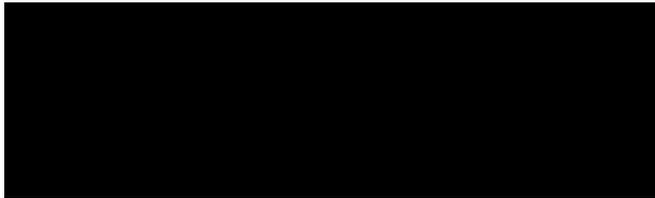


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File: EAC 04 150 52972 Office: VERMONT SERVICE CENTER

Date: OCT 27 2005

IN RE: Petitioner:
Beneficiary:



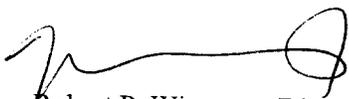
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont 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 dismissed.

The petitioner filed this nonimmigrant petition seeking to employ 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 claims to be a branch office of [REDACTED] located in Amarpet, India, and is authorized to conduct business in the State of New Jersey. The petitioner is engaged in the development and manufacture of pharmaceuticals. The petitioner seeks to employ the beneficiary as its general manager (technical services) for a three-year period.

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

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, the petitioner asserts that the director placed undue emphasis on the number of employees presently employed by the U.S. company, and failed to consider the size of the overseas operations and the petitioner's intended manufacturing operations in the United States in determining whether the beneficiary will be employed in a managerial or executive capacity. The petitioner submits a letter 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(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 an April 9, 2004 letter submitted with the initial petition, the petitioner described the beneficiary's proposed job duties as follows:

As General Manager (Technical Affairs), [the beneficiary] will have the authority to make discretionary decisions regarding the day-to-day operations. [The beneficiary] will exercise a wide range of responsibilities including, but not limited to (a) exercising authority with regarding to hiring, training, delegation of assignments according to capabilities, promotions and remunerations; (b) conducting performance reviews and ensures that his staff follows corporate procedures; (c) managing and coordinating customer claims and questions; (d) developing new sources of supply in the United States and (e) providing local staff members with guidance by communicating [REDACTED] goals and objectives.

As General Manager (Technical Affairs), [the beneficiary] would directly manage and oversee the business in all aspects of its technical affairs. [The beneficiary] would represent [the petitioner's] business development operations in consultation with [the] head office to ensure new strategies are accurately communicated and implemented. He has the full authority to legally bind [the petitioner] by negotiating and executing supply agreements with local generic manufacturing companies.

The petitioner indicated on Form I-129 that it employed two individuals at the time of filing, and submitted its New Jersey Form 927-W, Employer's Quarterly Report, confirming the employment of its president during the fourth quarter of 2003. The petitioner stated that the U.S. branch office was established to oversee existing manufacturing facilities in California, to make additional investments in constructing U.S. manufacturing facilities, to coordinate the marketing of pharmaceutical ingredients and final products manufactured in India and the United States, and to coordinate all of the investments and activities in North America.

On April 30, 2004, the director requested additional evidence to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. Specifically, the director requested: (1) a comprehensive description of the beneficiary's proposed duties and an explanation as to how they will be managerial or executive in nature; (2) a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; (3) a list of United States employees including each employee's name, job title, complete position description, and a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; (4) the number of subordinate employees who will be under the beneficiary's supervision and their job duties; (5) the amount of time the beneficiary will allot to executive/managerial duties, and the amount devoted to other non-executive functions; and, (6) an explanation regarding the degree of discretionary authority the beneficiary will have in the proposed position.

In a response dated May 20, 2004, the petitioner explained that it intends to establish operations for the development, manufacture and marketing of generic pharmaceutical products, and through a subsidiary, has identified an existing building to be used for its office, development laboratory, manufacturing, warehousing and distribution activities. The petitioner indicated that the beneficiary "would be responsible to look after the project" and following completion, would work in the manufacturing facility as "head of technical and engineering services." The petitioner further described the beneficiary's proposed duties as follows:

His expertise in Building designing, Air Handling units and Refrigeration Plan selection, Process water Producing Plant (RO plant) Designing, Designing of Quality Control Laboratories, Development Center and Manufacturing areas would help [the petitioner] to implement the Project for Pharmaceutical Formulation Unit, within the USFDA regulatory framework.

Subsequent to installation, he will also be responsible for Qualifying Equipments & facilities, conducting the Process Equipments Qualification. After the commissioning [of] the Plant, he will look after the Technical services group, to support manufacturing in the area of Trouble shooting, Time to time Re-qualification of Equipments, Processes and Supporting the future expansion plans of the Company.

* * *

As part of his responsibility, he will also actively involve and get the Manufacturing Technology transferred from Development Laboratory in Hyderabad, India, to the plant in New Jersey, US.

[The beneficiary] [w]ill thus head a Project Management, initially consisting of 2 Engineers. He will Coordinate with the External Design and Architectural Engineers and Consultants, Contactors [sic], State / Local Township authorities, Regulatory authorities during execution of the Project. After completion, [the beneficiary] will head a Maintenance and Technical Services Department constituted with Maintenance Engineering and Technical staff consisting of 10-12 employees to provide Technical Support to Production Department.

The petitioner submitted an organizational chart depicting a chief executive officer over the beneficiary's proposed position and a vice president responsible for "administration/commercial/logistics." The chart shows vacant positions in the areas of marketing and distribution, manufacturing, financial, and quality assurance and regulatory affairs. There are no subordinate employees, current or proposed, listed under the beneficiary's position. Although requested by the director, the petitioner did not provide job descriptions for the petitioner's other employees, a breakdown of the number of hours the beneficiary and the other employees will spend on their job duties, or indicate the amount of time the beneficiary will allot to managerial or executive duties.

On June 17, 2004, the director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity in the United States. The director observed that the petitioner did not currently employ any personnel who would relieve the beneficiary from performing the day-to-day duties of running a business, and noted that the petitioner must establish that the beneficiary will be acting in a primarily managerial capacity at the time the petition is approved. The director also reviewed the beneficiary's job description and found that he "will be doing almost everything" involved in the running of the office, since there is no staff to relieve him from performing the non-qualifying duties. The director acknowledged that the petitioner intended to hire additional staff in the future, but found that the beneficiary would be required to perform the duties of the vacant positions until such persons are hired.

On appeal, the petitioner claims that the beneficiary will serve in a managerial position involving “substantial responsibility and accountability in achieving company objectives by directing and controlling supervisory personnel directly reporting to him.” The petitioner submits evidence that [REDACTED] Inc., a subsidiary of the foreign entity established in February 2004, completed the purchase of a 250,499 square foot building in New Jersey to be used for pharmaceutical development, manufacturing and warehousing operations on June 29, 2004. The petitioner claims that the foreign entity will invest over \$20 million to convert the building to be used for pharmaceutical development and manufacturing activities, and asserts that the beneficiary will be responsible for planning and implementation of the project, including responsibility for guiding, directing and controlling a team of professionals and external contractors.

Specifically, the petitioner indicates that the beneficiary will: plan and implement a \$10 million capital investment for the pharmaceutical manufacturing facility; recruit department heads for the technical department, project engineering and plant maintenance engineering; select construction contractors, and consulting engineers whose duties would be overseen by department heads; and be a member of the management team responsible for shaping company direction and achieving company goals. The petitioner also notes that while the branch office has only three employees, its group employs over 3000 worldwide. The petitioner claims that the U.S. office will employ approximately 25 workers by the end of 2004 and over 100 workers within 18 to 24 months once the manufacturing plant commences operations. The petitioner asserts that it intends to initially staff its operations with management employees who will be responsible for building and managing their respective departments. The petitioner claims that the evidence submitted on appeal establishes that the beneficiary will serve in a managerial capacity pursuant to section 101(a)(44)(A) of the Act.

In support of the appeal, the petitioner submits a new organizational chart showing a chief executive officer supervising seven departments headed by vice presidents or directors, including the beneficiary, the vice president for administration/commercial/logistics, and an API marketing and distribution director who was not employed at the time the petition was filed. The other department head positions are vacant. The chart shows that the beneficiary will supervise a project engineer, manager technical services, and a plant engineer, and that the subordinates will in turn supervise engineers, consultants, contractors, mechanics, electricians and formulators. The petitioner submits its New Jersey Form 927-W for the first quarter of 2004 confirming the employment of a vice president, and a payroll journal for the month of May 2004 showing the vice president, the chief executive officer, and the employee identified as a “project engineer.”

Upon review, the petitioner’s assertions are not persuasive. The petitioner has not submitted sufficient evidence to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity as of the date the petition was filed. 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(I)(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 has provided a vague and nonspecific description of the beneficiary’s duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner initially stated that

the beneficiary will “make discretionary decisions regarding the day-to-day operations,” “manage and oversee the business in all aspects of its technical affairs,” and “exercise authority with regard to hiring” and other personnel decisions. These statements merely paraphrase portions of the statutory definition of managerial capacity. See sections 101(a)(44)(A)(i),(ii) and (iv) of the Act, 8 U.S.C. §§ 1101(a)(44)(A)(i), (ii) and (iv). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner also indicated that the beneficiary would “manage and coordinate customer claims and questions,” and “develop new sources of supply in the United States,” including authority to execute supply agreements. However, the petitioner did not identify any current or proposed employees who would perform day-to-day customer service duties, or who would be responsible for performing market research and other non-qualifying duties associated with “developing” supply sources. Accordingly, the petitioner did not establish that these responsibilities would include managerial duties, rather than operational tasks necessary to produce a product or provide a service. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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).

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 show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a beneficiary not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

The director advised the petitioner that its initial description of the beneficiary's duties showed that he would be primarily engaged in the day-to-day operations of the company and supervising employees who had not been shown to be employed in managerial, professional or supervisory positions. Accordingly, the director requested a comprehensive description of the beneficiary's duties, the amount of time he would allocate to managerial duties, a detailed breakdown of the number of hours he would devote to each of his duties on a weekly basis, and a list of the beneficiary's subordinates including job descriptions for each subordinate.

The petitioner's response to the director's request for evidence did not include the comprehensive job description and detailed breakdown of job duties requested by the director, or elaborate upon the job description previously provided. 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). Instead, the petitioner indicated that its claimed subsidiary was in the process of establishing a manufacturing facility for pharmaceutical development and manufacturing, that the beneficiary would initially manage the conversion of the building, and that he would later work in the manufacturing facility as head of technical and engineering services.

However, the petitioner's initial description of the beneficiary's duties indicated that he would manage the technical department and its employees, manage and coordinate customer claims, source suppliers and negotiate supplier agreements, and communicate with the head office in India; the petitioner made no mention of the beneficiary's role in managing a major project to convert a building into a manufacturing plant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Moreover, even if the AAO accepts the later version of the beneficiary's job description as an accurate depiction of his proposed position, the job description submitted in response to the request for evidence is insufficient to establish that the beneficiary's role in the building conversion project would be primarily managerial or executive in nature. For example, the petitioner indicated that the beneficiary would utilize his expertise in building design, air handling unit and refrigeration plant selection, and laboratory and manufacturing design in order to "help" the petitioner implement its "Project for Pharmaceutical Formulation Unit." The petitioner also indicated that the beneficiary would "be responsible for Qualifying Equipments & facilities," and conduct "Process Equipments Qualification." Without further explanation of how the beneficiary will perform these duties, it appears that he will be performing technical, design-related tasks and quality control functions, rather than the high-level duties specified in the definitions of managerial or executive capacity.

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 will primarily perform non-managerial operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job 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).

On appeal, the petitioner claims that the beneficiary will manage a staff of supervisors or professionals who in turn will supervise staff responsible for the day-to-day operations of the company. As discussed below, the petitioner has not established that it employed any employees would be subordinate to the beneficiary as of the date this petition was filed. 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.*, *supra*.

Initially, the petitioner claimed that the beneficiary would hire and supervise staff for the technical services department, but did not provide further detail regarding the beneficiary's proposed subordinates. In response

to the director's request for evidence, the petitioner indicated that the beneficiary would manage two engineers, and would directly coordinate with external design and architectural engineers and consultants, contractors, state and local authorities and regulatory authorities. The petitioner also indicated that following commencement of manufacturing operations, the beneficiary would hire 10 to 12 maintenance engineering and technical staff to provide technical support to the production department. Although specifically requested by the director, the petitioner did not provide job descriptions for the beneficiary's proposed subordinates. Again, 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).

On appeal, the petitioner claims that the beneficiary will supervise three supervisory employees, who will in turn supervise their own subordinate staffs of employees and contractors. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Regardless of the petitioner's subsequent attempts to enhance the organizational structure of the beneficiary's department, it is evident from the record that the petitioner only employed a chief executive officer and a vice president at the time the petition was filed.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, as discussed above, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. It has been noted in the record that there were only two employees working at the petitioner's branch office, and both of them have managerial or executive job titles. There is no mention in the record of any lower-level staff to perform the day-to-day administrative, clerical and operational functions the petitioning enterprise. Collectively, this brings into question how much of the beneficiary's time would actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

While the petitioner emphasizes that its corporate group employs 3000 people worldwide, and projects that the U.S. branch will employ over 100 people within two years, these assertions have no bearing on a determination as to whether this beneficiary's role within a branch office currently staffed by two employees

will be primarily managerial or executive in nature. While the AAO is persuaded that the petitioning organization would eventually support a bona fide managerial or executive position if it realizes its plan to operate a manufacturing facility with 100 employees, the petitioner must show that it has sufficient staff to support the beneficiary in a managerial or executive capacity from the date of filing. Unlike a petitioner filing a "new office" petition pursuant to 8 C.F.R. § 214.2(1)(3)(v), this petitioner will not be afforded additional time to move away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Upon review of the vague and conflicting job descriptions provided by the petitioner, and considering the lack of lower-level employees available to perform non-qualifying duties at the time of filing, it cannot be found that the beneficiary will be employed in a qualifying managerial or executive capacity. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.