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File: WAC 04 135 50521 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

IN BEHALF OF PETITIONER:



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/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 import and export of food products. The petitioner claims that it is the subsidiary of [REDACTED] located in Shanghai, China. The beneficiary was initially granted L-1A classification for a one-year period in order to open a new office in the United States and the petitioner now seeks to extend his stay.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in his determination that the beneficiary's subordinates are only employed on a part-time basis, and thus came to an erroneous conclusion that the beneficiary is primarily engaged in non-qualifying duties. Counsel claims that the petitioner submitted sufficient evidence to establish that the beneficiary will serve in a primarily managerial or executive capacity.

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 (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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a March 31, 2004 letter submitted with the initial petition, the petitioner described the beneficiary's duties as:

[P]lan and develop organizational 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; supervise and direct the corporate business promotion and public relations arrangement; and ensure proper implementation of our parent company's general business politics to Petitioner; and hire, fire, and train managerial employees of the Petitioner.

The petitioner indicated that the beneficiary supervised three employees, including a documentation manager, an administrative and financial manager, and a sales manager/customer service manager. The petitioner provided a job description and salary information for each subordinate, and stated that the documentation manager was employed part-time. The petitioner stated: "[I]t's clear that [the beneficiary] has met the requirement of executive capacity by exerting significant authority over the generalized policy of an organization. Also substantially all of the [sic] his duties are at the managerial or executive level, substantiated by the fact that he is supervising three subordinate managerial employees who are [to] be supported by their own staff."

On April 20, 2004, the director requested additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity with the United States entity. Specifically, the director requested: (1) a copy of the petitioner's organizational chart, including the names, job titles, job duties, educational level and annual salaries for all employees under the beneficiary's supervision; (2) IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last four quarters; (3) copies of the petitioner's payroll summary, Forms W-2 and Forms W-3 evidencing wages paid to employees; and (4) California Forms DE-6, Quarterly Wage Report, for the last four quarters. In addition, the director cited the definition of "executive capacity" and instructed the petitioner to submit: a list of the specific goals and policies the beneficiary has established over the last six months; a list of the specific discretionary decisions the beneficiary has exercised over the last six months; evidence that higher-level executives, the board of directors, or stockholders of the organization require only general supervision of the beneficiary; and a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response received on May 18, 2004, the petitioner provided the following description of the beneficiary's duties:

[The beneficiary] exercises wide latitude of discretionary authority in the day-to-day operations and performs oversight, through subordinate employees, on all functions such as financial accounting and reporting, assessment of consumer demand, marketing and supervision, hiring and firing of employees. [The beneficiary] will be responsible for formulating long-term goals and policies. [The beneficiary] exercises significant and ultimate authority on all important business decisions. Specifically, [the beneficiary's] time is distributed as follows:

He spends 15% of his time in setting up company's policies, directing preparation of directors to departmental administrators outlining policies, programs, or operations.

He spends 15% of his time in the business management including formulation of marketing strategies, contracts negotiation with customers regarding prices and terms.

He spends 15% of his time for personnel evaluation including hiring, firing and training employees for each department.

He spends 35% of his time for monthly management meeting with department head for operational problem, studies information and selects plan from competitive proposals that affords maximum probability of profit or effectiveness. The 35% of his time is further distributed as the following:

[The beneficiary] will spend approximately 15% of his time exercising his discretionary authority in managing client relations on behalf of the company by conducting discussions with clients and the sales Department Manager to identify client business problems and opportunities for the Company to solve these problems through improved after-sale services, and reviewing sales activity, operation, and sales reports to determine changes in operation required.

He spends 10% of his time in conferring monthly with Administrative and Accounting Department Manager for the report of cash flow and financial status of the Company every month, and allocating operating budget, analyzing department budget requests to identify areas in which reduction can be made.

He spends 10% of his time in conferring monthly with Documentation Department Manager to ensure the compilation and maintenance of merchandise records and the preparation of documents required for import and export trading. He will coordinate the Documentation Department with Sales Department to maintain the records of all business transactions.

[The beneficiary] will spend [sic] 20% of his time engaged in frequent travels between the United [sic] States and China to collect latest market information, and to meet with clients and to design, hold or attend information seminars for subordinates and China Parent company.

As such, [the beneficiary] will not be involved with the day-to-day non-supervisory duties. Rather, he will focus on high-level strategic planning and perform oversight of the company through his subordinate employees.

In response to the director's request for a list of the specific discretionary decisions exercised by the beneficiary, the petitioner indicated that the beneficiary: (1) chose the company's office location; (2) set up four departments within the company; (3) recruited employees and appointed each department manager; (4)

chose an accounting firm to perform financial and tax consulting services; and (5) negotiated and signed an exclusive distribution agreement with [REDACTED]

In response to the director's request for a description of the specific policies developed by the beneficiary, the petitioner submitted a one-page document which lists the petitioner's office hours, pay schedule, personnel review policy, dress code and office equipment policy. The petitioner also submitted a two-page business plan as evidence of the goals established by the beneficiary.

The petitioner provided the requested organizational chart that depicts the beneficiary as president/CEO over a customer service department manager, a documentation department manager, an administration and accounting department manager, and a sales department manager. The sales and customer service department manager positions are both held by the beneficiary's spouse. The chart indicates that the sales manager oversees an independent sales representative, the administration and accounting manager oversees an outside accounting manager, and that two to three additional documentation and/or customer service positions are planned.

The petitioner provided job descriptions for the beneficiary's subordinates. The sales department manager establishes and expands the sales network through sales representatives; recruits and trains sales representatives; negotiates with major clients; coordinates with manufacturers to meet local standards and client specifications; and reports to the beneficiary regarding sales targets, sales volumes and sales improvement plans. The administration and accounting department manager oversees the overall administrative operations of the company; coordinates the activities of the departments; directs preparation of directives to departmental administrators outlining policies, programs or operations changes; coordinates all employees in their working schedules; and directs outside accounting professionals. The documentation department manager is in charge of directing the compilation and maintenance of merchandise records; including quality, type and value of material, merchandise or supplies; prepares documents required for import and export trading, including custom declaration, invoicing, bill of lading and trade-related activities; and coordinates with the sales department to maintain records of all transactions. The customer service department manager coordinates sales representatives' working activities; coordinates with the documentation department to provide records of business transactions, instructs sales representatives to follow up with manufacturers; arranges domestic delivery of products; and makes the final decision when sales representatives cannot resolve customer complaints. The petitioner submitted Forms DE-6, Quarterly Wage Reports confirming the employment of the claimed employees, and again stated that the documentation manager is employed on a part-time basis. The wages paid to the other employees are consistent with full-time employment. The petitioner also submitted the requested Forms W-2, Wage and Tax Statement, for 2003 and Forms 941, Employer's Quarterly Tax Return, for the previous three quarters.

The director denied the petition on May 27, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that none of the beneficiary's subordinates could be considered to be serving in a managerial, supervisory or professional capacity. The director also noted that the beneficiary's subordinates appeared to be employed on a part-time basis, based on the petitioner's 2003 Forms W-2. The director found that a preponderance of the beneficiary's duties would therefore be spent directly providing the services of the business, rather than performing the claimed managerial duties.

On appeal, counsel for the petitioner asserts that the director's decision was based on the erroneous conclusion that the beneficiary's subordinates are part-time employees. Counsel notes that the employees' Forms W-2 reflected low wages for 2003 because they were hired in November and December of that year, and asserts that all three subordinates were working for the petitioner full-time when the petition was filed. Counsel contends that because of this error, the director mistakenly inferred that the beneficiary must be primarily engaged in providing the services of the business. Counsel states that although the beneficiary performed some non-qualifying duties during the first year of operations, the beneficiary's staff at the time of filing was sufficient to relieve him from performing non-qualifying duties. Counsel also claims that the director failed to consider the petitioner's increase in staffing, customers and sales during the first year of operations and the resulting need for the beneficiary's extension of stay in a managerial or executive capacity.

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(1)(3)(ii). Upon review, counsel's assertions are not persuasive. 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 the instant matter, the petitioner does not clarify whether it claims the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The petitioner and counsel refer to the position as managerial in some instances, and as executive in others. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In addition, 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).

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. Although the petitioner submitted a lengthy job description in response to the director's request for evidence, it failed to provide the specific day-to-day description of the beneficiary's duties that the director requested. For example, the petitioner stated that the beneficiary spends 15 percent of his time "setting up company policies" and "directing preparation of directives to departmental administrators outlining policies, programs or operations." This same vague language is also included in the petitioner's job description for the administrative and accounting manager and provides little insight into either employee's actual duties. 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). When asked for a specific description of policies developed by the beneficiary, the petitioner provided what appears to be a one and a half-page employee handbook addressing office hours, dress code, parking availability, use of office equipment and other routine matters. The petitioner has not established that the beneficiary devotes a significant portion of his time to generalized policy matters.

The petitioner states that the beneficiary devotes 15 percent of his time to “formulation of marketing strategies” and “contract negotiation with customers regarding prices and terms,” and an additional 15 percent of his time “managing client relations of the Company by conducting discussions with clients and the sales Department Manager to identify client business problems.” The beneficiary also devotes an additional 20 percent of his time traveling between the United States and China to collect market information, meet with clients and hold and/or attend information seminars. Without further explanation, these duties, which account for 50 percent of the beneficiary’s time, depict an employee who is directly involved in the company’s day-to-day sales, marketing and customer service operations. 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 petitioner indicates that the beneficiary devotes a total of 20 percent of his time to monthly meetings with the administrative and accounting manager and the documentation manager, but fails to explain why a monthly meeting would require such a large portion of the beneficiary’s time. Reciting the beneficiary’s vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary’s daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

The petitioner indicates that the beneficiary will devote a portion of his time to supervising the staff of each department, including responsibility for hiring, training and personnel evaluation. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Although the petitioner refers to all three subordinates as managers, the petitioner has not shown that any of these employees supervise subordinate staff members or manage a clearly defined function. The job description for the sales/customer service manager indicates that this employee supervises “sales representatives.” The petitioner provided the name of one individual purportedly employed on a contract basis as a sales representative, but did not provide his job description or evidence that he had been paid for his services. 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. 190 (Reg. Comm. 1972)). Further, although the petitioner refers to the employees as “department managers,” without subordinates, each employee would necessarily perform the routine operations of his or her department, rather than manage the department. The petitioner has not established that the positions held by the beneficiary’s subordinates require a bachelor’s degree, such that they could be classified as professionals. The petitioner has not shown that the beneficiary’s subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Accordingly, counsel’s claim that the beneficiary has “set in place a management layer” of staff to relieve him from performing the non-qualifying duties of the company is not persuasive. As discussed above, the petitioner has not documented that any of the beneficiary’s three subordinates are performing managerial or supervisory duties, and the petitioner’s description of the beneficiary’s duties indicates that he may spend 50 percent or more of his time on non-qualifying sales, marketing and customer service tasks. When examining

the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Counsel claims that the director misinterpreted the petitioner's staffing levels by relying on the petitioner's 2003 Forms W-2 to determine whether the beneficiary's claimed subordinates are employed on a full-time basis. The AAO concurs that the petitioner submitted sufficient evidence to establish that it employed the sales/customer service manager and administration and accounting manager on a full-time basis as of April 2004 when the petition was filed.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties after the first year of operations. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

While the beneficiary performs some executive and managerial tasks, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it has hired an additional employee since the petition was filed and plans to hire additional managers and employees 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). As noted above, 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. 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 appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner indicated on Form I-129 that the beneficiary's foreign employer owns 100 percent of its stock. The petitioner submitted its stock certificate number one and stock transfer ledger confirming that 50,000 shares were issued

to the foreign entity in January 2003. The stock ledger does not show any additional issuance of stock. However, the petitioner's IRS Form 1120, U.S. Corporate Income Tax Return for the year ended on August 31, 2003 indicates on Schedule K that the company has two shareholders, and that the foreign entity owns only 51 percent of the petitioner's stock. The Form 1120, at Schedule L, shows that the value of stock issued was \$50,000 as of August 31, 2003, which suggests that the foreign entity transferred 49 percent of its shares to another shareholder. Finally, the petitioner submitted a balance sheet dated March 16, 2004, which indicates the value of the petitioner's capital stock as \$100,000. 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). Due to the unexplained evidence in the record suggesting additional, undisclosed stock transactions, the AAO cannot conclude that the petitioner and the foreign entity maintained a qualifying relationship at the time the petition was filed. For this additional reason, the petition may not be approved.

Although not specifically addressed by the director, the petitioner has not established that it was doing business for the year preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). The beneficiary was granted the period from April 30, 2003 until April 30, 2004 in order to establish the petitioner's new office. In a statement submitted on appeal, the beneficiary states: "The actual business of the U.S. company did not start until November 2003[.]" For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.