

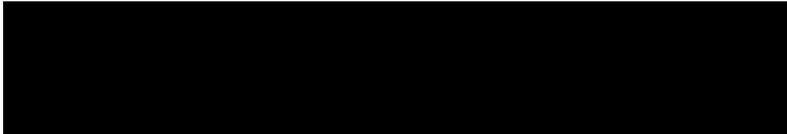


U.S. Citizenship
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File: EAC 03 183 51356 Office: VERMONT SERVICE CENTER Date: JAN 27 2006

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

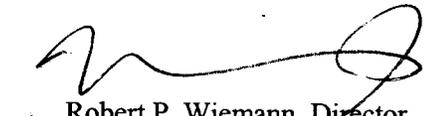
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont 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 general manager 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 New York that is engaged in the travel and tourism business. The petitioner claims that it is the subsidiary of Shanghai Shihua International Travel Service 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 asserts that the director's decision was based upon a limited review of the evidence submitted in support of the petition, and that the petitioner submitted sufficient evidence to establish that the beneficiary will serve in a primarily managerial or executive capacity. In support of this assertion, the petitioner submits 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary 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 indicated that the beneficiary would "direct and supervise company operations in the United States subsidiary including standards for the work and general guidelines for assignment, which are transmitted to each employee." In a May 13, 2003 letter appended to the petition, the petitioner provided the following job description:

[The beneficiary] will continue to fill the position of General Manager of the U.S. operation. His responsibilities include: Direct and supervise operations of the U.S. company; Exercise wide discretion on day to day operations and establish policies and goals; Direct, supervise and coordinate activities concerned by other professionals and managers of budget, sales, services, clients as well as expanding markets in the United States; Confer with parent company to plan and coordinate business objectives and cooperation between the two offices.

[The beneficiary's] duties in addition to those not already noted include: Manager and direct local staff supervisory personnel in merchandising travel services; Review staff recommendation of new hires of employees; Review sales of company carrier transportation of tickets, packaged or specialized tours; oversee work schedules for employees and review training plans of employees in advising customers on current traveling conditions and planning customer travel; Prepare reports to the parent company on a regular basis of the financial results and strategic plans for the establishment of additional offices in New York metropolitan and other major U.S. cities.

The petitioner indicated on Form I-129 that it employed five individuals at the time the petition was filed. The petitioner also submitted its IRS Form 941, Employer's Quarterly Federal Tax Return and Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the first quarter of 2003 and last quarter of 2002. These documents show that the petitioner had two payroll employees,

including the beneficiary. The petitioner also submitted copies of two Forms W-2, Wage and Tax Statement, issued in 2002, and its 2003 Form W-3, Transmittal of Wage and Tax Statements.

On July 17, 2003, the director requested additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director requested that the petitioner submit: (1) an organizational chart for the United States entity indicating where the beneficiary will assume his role in a managerial capacity; and (2) a complete position description for and educational credentials of all of the beneficiary's subordinates in the United States, including a breakdown of the number of hours devoted to the employee's job duties on a weekly basis. The director specifically noted that the petitioner must demonstrate that the beneficiary will function at a senior level within an organizational hierarchy, as well as substantiate that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing non-qualifying duties, if appropriate.

In response, the petitioner submitted a letter dated July 31, 2003, which provided the following expanded job description for the beneficiary:

[D]irects and supervises operations of the U.S. company; exercises wide discretion on day to day operations and establish policies and goals; directs, supervises and coordinates activities carried out by other professionals and managers of budget, sales, services, clients as well as expanding markets in the United States. [The beneficiary] is responsible for devising strategies and formulates policies to ensure that the goals and objectives of the company are met.

* * *

[M]anage and direct local supervisory managers and professionals, such as the tour guide supervisor, computer professional including the CPA. The personnel in these areas, plus the merchandising travel services duties are approximately 25 hours per week. He also reviews staff recommendation of new hires of employees 5 hours; Review sales of company carrier transportation of tickets, packaged or specialized tours 5 hours; oversee work schedules for employees and review training plans of employees in advising customers on current traveling conditions and planning customer travel for 10 hours; Prepare reports to the parent company on a regular basis on the financial results and strategic plans for establishment of additional offices in the New York metropolitan and other major cities in the U.S. for 5 hours.

In response to the request for evidence, the petitioner claimed to employ seven employees, including five local staff and two overseas sales representatives based in China. According to the petitioner, the United States-based office staff includes the beneficiary, a full-time operations manager and a full-time "tour agent and tour guide supervisor." The petitioner also indicated that it employs two tour guides who work flexible hours, and two sales people who work in Shanghai and are paid by the parent company. The petitioner provided evidence that the two tour guides and one of the overseas sales representatives have a bachelor's

degree or higher. The petitioner also provided an organizational chart which includes the above-referenced employees, as well as an accountant who is identified as an independent contractor.

On August 18, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The director specifically noted that none of the beneficiary's subordinates can be considered managers or professionals, and further noted that the petitioner does not appear to require the services of a bona fide manager or executive. The director concluded that the beneficiary would be primarily engaged in the non-managerial, day-to-day operations of the company.

On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the petitioner's operations, and states that sufficient evidence was submitted to establish that the beneficiary is employed in a primarily managerial or executive capacity. Counsel further contends that the director inappropriately dismissed the job duties and qualifications of the beneficiary's subordinates, and asserts that the beneficiary qualifies for the benefit sought because he supervises and controls the work of other supervisory, professional and managerial employees.

Upon review, 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.* The petitioner does not clarify whether the beneficiary is claiming to 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. A portion of the beneficiary's job description paraphrases the statutory definition of "executive capacity," yet the petitioner claims that the beneficiary qualifies for the benefit sought based on his supervision of managerial, supervisory and professional employees, which is a characteristic of a managerial employee. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

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)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner indicates that the beneficiary "exercises wide discretion on day to day operations," "establishes policies and goals," and "directs and supervises operations of the U.S. company." 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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The more detailed description of the beneficiary's typical work week, provided in response to the request for evidence, reveals that he spends the majority of his time, forty hours per week, involved in personnel matters, including managing the company's employees, reviewing recommendations regarding new hires, overseeing work schedules for employees, and reviewing training plans. 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 section 101(a)(44)(A)(ii) of the Act.

Upon review of the record, the petitioner has not substantiated its claim that the beneficiary manages a staff of professional, supervisory or managerial employees. It is noted that two of the petitioner's employees, the "operations manager" and "tour guide supervisor" have managerial or supervisory job titles. However, there is no evidence on record to establish that the petitioner actually employs the individual identified as the "tour guide supervisor" on a direct or indirect basis. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit a statement regarding the staffing of the United States operation and evidence of wages paid to all employees during the previous year. 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)). Furthermore, the job description provided for this position, which the petitioner claims is held by the beneficiary's spouse, includes primarily operational and clerical duties, rather than supervisory duties. Finally, the AAO notes that the individual identified as the "tour guide supervisor" in the petitioner's response to the request for evidence is identified as the company's secretary on the Form I-907 submitted with the petition. 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).

Similarly, the petitioner has not established that the "operations manager" is performing managerial or supervisory job duties. Many of the duties listed for this position are exactly the same as those listed for the beneficiary, so the AAO cannot determine who actually "oversees the day-to-day activities" of the company and the lower-level employees. The petitioner claims that the "operations manager" assigns and supervises the "tour guide supervisor," who has not been established as an actual employee, as well as the work of the accountant, an independent contractor. However, the organizational chart indicates that the beneficiary directly supervises the accountant. In addition, the petitioner has submitted no evidence to establish that it actually employs the China-based sales staff, nor evidence that the operations manager actually supervises the two tour guides who work for the petitioner as independent contractors. Again, 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. at 165. Finally, the petitioner indicates that the operations manager serves in a dual role as a ticket agent, which requires her to perform operational duties including air ticket sales, contacting airlines, receiving phone calls, and assisting customers with making reservations of tickets, hotels and transportation rentals. Based on the limited information provided, the AAO cannot conclude that the "operations manager" serves in a supervisory or managerial capacity.

In addition to providing individual job descriptions for its claimed employees, the petitioner provided a description of the weekly duties performed by its "office staff," which includes the beneficiary, the operations manager, and the claimed tour guide supervisor. All of the duties listed are routine operational duties, including sales calls, making travel arrangements, printing tickets, collecting payments from customers, and providing customers with information and brochures. The petitioner did not indicate how these non-managerial, non-supervisory duties are divided among its small office staff. If the beneficiary is participating in these types of non-qualifying duties, it should be noted that 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 may not create artificial tiers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary's subordinates correspond to their placement in an organization's structural hierarchy. In this case, the petitioner has not established that the beneficiary manages supervisory or managerial personnel.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of a tour guide or an operations manager/ticket agent, who are among the beneficiary's subordinates. Counsel asserts on appeal that the petitioner's accountant should be considered a professional employee. However, the petitioner has provided no description of the accountant's duties, and no any evidence of payments made to the accountant. While it is evident that an outside accounting firm prepared tax documents for the petitioner, there is insufficient evidence to substantiate counsel's claim that an accountant is working under the beneficiary's supervision as a professional employee of the petitioning company. Again, 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. at 165.

On appeal, counsel claims that the director erroneously placed undue emphasis on the size of the petitioning company. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for

the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a two-year-old travel and tourism services company that claimed to have a gross annual income of \$442,455. The petitioner has established that the firm employed the beneficiary as president, an operations manager/ticket agent, and two tour guides. Based on the petitioner's representations, it does not appear that all of the non-qualifying sales, marketing, customer service and administrative functions of the petitioning company might plausibly be performed by a single office employee. Rather it appears that the beneficiary would necessarily be involved in performing many of the day-to-day non-qualifying tasks required to keep the business operational. 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 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).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 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 order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of

organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements. The petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). In fact, the petitioner provided no evidence that the foreign company is still a qualifying entity doing business in China, nor evidence of the current ownership and control of each entity. The petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). Finally, the petitioner has not submitted sufficient evidence of the financial status of the United States operation. For all of these reasons, the petition may not be approved and the appeal will be dismissed.

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).

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.