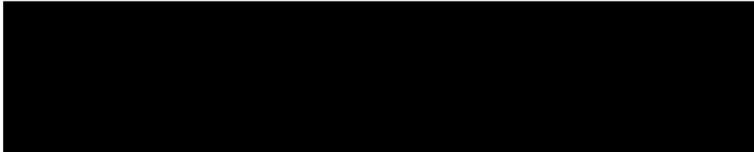




U.S. Citizenship
and Immigration
Services

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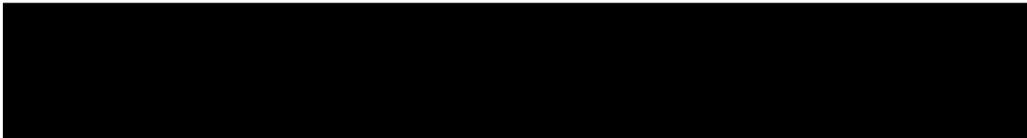
File: WAC 05 110 51374 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2007

IN RE: Petitioner:
Beneficiary:



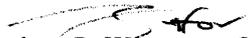
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
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 visa petition seeking to extend the employment of its vice president 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 under the laws of the State of California and is the United States sales office for a Singapore-based manufacturer.

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 to the petitioner asserts that the director erred and that the beneficiary is primarily performing qualifying duties. In support of this assertion, counsel submits a brief.

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)(i) requires a petition to extend an individual petition under

section 101(a)(15)(L) of the Act to be filed using Form I-129.

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.

The petitioner does not clarify in the initial petition 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 beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets

each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary is employed either as an executive *or* a manager and will consider both classifications.

The petitioner described the beneficiary's job duties in a letter dated January 7, 2005 as follows:

- Directing and developing US operations from start up to present: business set up, new business development, finance, and operations, including negotiating contract terms on behalf of the company;
- Establishing and executing goals and policies relating to operations, finance, and marketing:
 - Developing, seeking approval for, and implementing the quarterly and annual budget.
 - Developing and implementing standardized sales and technical support procedures for the US market.
- Managing the product life cycle and customer relationships through technical and operational staff in the US, Singapore, China and Malaysia. Nearly all of our customers are headquartered in the United States. Like us, our customers have major manufacturing facilities in SE Asia and China. It takes a great deal of sophisticated managerial expertise to coordinate all the players in a typical product life cycle. As a result, [the beneficiary] is responsible for:
 - Coordinating between the engineering design teams of the customer (in the US) and [the foreign entity] (in Singapore) on project definition and implementation.
 - Synchronizing development of the manufacturing plan (Design for Manufacturing – DFM) between the manufacturing engineers of the customer (in SE Asia and China) and [the foreign entity] (also in SE Asia and China).
 - Overseeing mould flow analysis by [the foreign entity] (in Singapore) for customer manufacturing engineers (in SE Asia and China) and design engineers (in US).
 - Delivering high customer satisfaction through efficient quality control (in [the foreign entity's] manufacturing plants in Malaysia and China) and problem resolution (in US, Singapore, Malaysia and China).
- Supervising and controlling the job performance of professional and technical personnel, including providing recommendations on decisions to hire, terminate and promote, and performance evaluations. These Singapore-based employees include:

- Project Engineer ([REDACTED])
 - Asst. Program Manager ([REDACTED]), who, in turn supervises his technical staff:
 - Senior Project Engineer ([REDACTED])
 - Project Engineer ([REDACTED])
 - Project Engineer ([REDACTED])
 - Sales Engineer ([REDACTED])
 - Marketing Assistant ([REDACTED])
- Managing US-based Outside Sales Consultants:
 - Dave Hicks (Southern California)
 - Bob Stevenson (Arizona)
 - Alex Shatkin (Northern California)
 - Organizational Reporting:
 - Executing discretion of day to day operations of the subsidiary.
 - Exercising wide latitude in discretionary decision-making.
 - Bi-weekly reporting to the Board of Directors on company operations and finance.

On May 19, 2005, the director requested additional evidence. The director requested an organizational chart for the United States operation, wage reports, and other documentary evidence relating to the petitioner's employees.

In response, counsel provided a letter dated August 8, 2005 in which he admits that the beneficiary is the petitioner's only employee. However, counsel provided an organizational chart placing the beneficiary close to the top of the organization directly or indirectly supervising six Singapore-based employees, directly supervising one China-based sales engineer, and directly supervising three United States-based "sales agents."

On October 26, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are qualifying and that his management of overseas staff and operations may be used to qualify him as an intracompany transferee.

Upon review, the petitioner'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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are

managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the beneficiary is described as "managing the product life cycle and customer relationships through technical and operational staff" and "establishing and executing goals and policies relating to operations, finance, and marketing." However, the petitioner does not explain what goals and policies will be established or what, exactly, the beneficiary does in the United States in "managing" product life cycles and customer relationships. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary is actually performing managerial 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, given that the beneficiary is the only employee in the United States, it has not been established that he is being relieved of performing non-qualifying operational and administrative tasks by a subordinate staff. While the manufacturing component appears to take place overseas, counsel also asserts on appeal that "all administrative functions of the US office are handled by the overseas parent company." However, counsel not only failed to offer evidence corroborating his assertion, the "set up" of the United States operation is one of the first duties ascribed to the beneficiary in the job description. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, while the petitioner asserts that three "sales agents" are working for the petitioner in the United States, the record is devoid of any evidence regarding the efforts of these agents, their time commitment to the petitioner, and the extent to which these agents relieve the beneficiary of the need to engage in non-qualifying duties such as marketing, sales, and customer relations. Therefore, absent a credible and specific breakdown of the beneficiary's duties and those duties performed by his claimed subordinates, it cannot be determined that he is "primarily" engaged in performing managerial duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, even assuming that any of the beneficiary's duties are managerial or executive in nature, the record does not establish to what extent the beneficiary renders his services to the petitioner. To the contrary, it appears that the beneficiary primarily renders services to the foreign entity. Services rendered to the foreign employer cannot be used to qualify the beneficiary as a manager or executive pursuant to section 101(a)(15)(L) of the Act because an intracompany transferee is defined as one primarily rendering services to

the United States entity. See 8 C.F.R. § 214.2(l)(1)(ii)(A); see also *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982). The petitioner alleges that the beneficiary supervises a variety of employees in both Singapore and China and aspects of the overseas manufacture and delivery of products. While counsel argues on appeal that the beneficiary has coordinated \$19 million in annual sales, the petitioner's 2004 IRS Form 1120 only lists \$151,221.00 in sales from April 1, 2004 through March 31, 2005. Therefore, the bulk of sales work was not performed for the petitioner but for the foreign entity as an agent. Absent a clear and credible breakdown of the amount of time the beneficiary spends rendering non-qualifying services to the foreign entity, it cannot be determined that he is primarily engaged in rendering managerial or executive services to the petitioner.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the record, the petitioner has no employees other than the beneficiary. Therefore, the beneficiary cannot be said to be managing the petitioner's employees. While the petitioner asserts that it employs three "sales agents," the record is not only devoid of any evidence establishing that these people are supervisory, managerial, or professional in nature, the beneficiary's supervision and control of non-employee independent contractors will not establish that he is supervising and controlling the work of supervisory, managerial, or professional *employees*. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(2); 26 U.S.C. § 31.3121(d)-(c)(2).

Likewise, the petitioner has not established that the beneficiary's alleged supervision of overseas employees in Singapore and China constitutes the supervision and control of supervisory, managerial, or professional employees for a variety of reasons. First, as explained above, the beneficiary's rendering of services to the foreign entity, including the supervision of its employees, may not be used to classify the beneficiary as a manager. Second, the record does not credibly establish that the beneficiary, who works in the United States, truly supervises and controls the work of the employees in China and Singapore. Not only does the record fail to provide any details explaining how the beneficiary manages to control and supervise the work performance of these subordinate employees, the job descriptions for the overseas employees provided in response to the Request for Evidence uniformly fail to identify the beneficiary as a direct or indirect supervisor. [REDACTED], and [REDACTED] are all described as reporting to people other than the beneficiary. The petitioner offers no explanation for this serious inconsistency.

Third, while the petitioner asserts that the subordinate employees in China and Singapore are professionals, the record does not clearly establish that these employees may be so classified. 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 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 to perform the work of the overseas employees. Absent this evidence, it has not been established that the beneficiary supervises and controls the work of professionals.

Moreover, while the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. As explained above, the petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial, i.e., rendering services to the foreign entity, supervising foreign employees, or performing non-qualifying duties for the United States entity. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary has been or will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. As explained above, the beneficiary appears to be either performing non-qualifying operational tasks or rendering services to the foreign entity. Therefore, the petitioner has not established that the beneficiary is, and will continue to be, employed primarily in an executive capacity.¹

¹It is noted that, in response to the Request for Evidence, the petitioner provided evidence regarding the establishment of a "joint venture" between the foreign entity and a United States-based company. While the

Although 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), it is appropriate for Citizenship and Immigration Services (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). 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) or (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility, and the petition may not be approved for that reason.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The previous approvals of L-1A petitions do not preclude CIS from denying an extension of the visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

petitioner provided an organizational chart indicating that the beneficiary will play a role in the "joint venture," the beneficiary does not appear to have an executive or managerial function within this organization. Moreover, the record is devoid as to how much time the beneficiary will dedicate to the joint venture and whether these services will be rendered in the United States or abroad. Simply put, the beneficiary's proposed role with the joint venture has been established to be managerial or executive in nature.