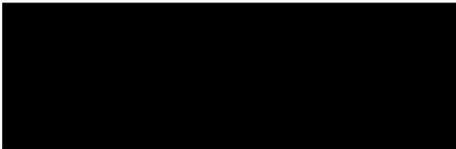




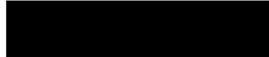
U.S. Citizenship
and Immigration
Services



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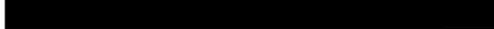
Date: **DEC 08 2012**

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The petitioner appealed the denial and the Administrative Appeals Office (AAO) subsequently dismissed the appeal. The matter is now before the AAO on a combined motion to reopen and reconsider. The AAO will grant the motion to reconsider and affirm its prior decision.

The petitioner filed the nonimmigrant petition seeking to classify the beneficiary under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an intracompany transferee employed in a managerial or executive capacity. The petitioner, an Ohio corporation, states that it is engaged in distribution of industrial products and supply chain management. It claims to be a wholly-owned subsidiary of BDI (Tianjin) Bearing Company, Ltd., located in the People's Republic of China. The petitioner seeks to employ the beneficiary as its International Trading Desk Manager.

The director denied the petition concluding that the petitioner failed to establish: (1) that the beneficiary has been or will be employed in a primarily executive or managerial capacity; and (2) the beneficiary possessed at least one continuous year of full-time employment abroad within the three years preceding the filing of the petition.

The AAO dismissed the petitioner's appeal, finding that the evidence does not support a finding that the beneficiary will be employed in a primarily managerial or executive capacity or that the beneficiary was employed in a managerial or executive capacity for the foreign employer. The AAO withdrew the director's determination that the petitioner failed to establish that the beneficiary possessed at least one continuous year of full-time employment abroad within the three years preceding the filing of the petition.

On motion, the petitioner submits a brief and an affidavit from its president and CEO which provides a detailed description of the petitioner's and foreign entity's supply chain which is intended "to clarify the accuracy and applicability of the L-1 visa for the beneficiary's position." The petitioner contends that the AAO erred in determining that the beneficiary would not be employed in a primarily managerial or executive capacity and that the beneficiary was employed in a managerial or executive position with the foreign employer.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner states on motion that the beneficiary's supervises an essential function of the organization and cites to precedent to support its contention that an employee who supervises an essential function

qualifies as a manager for L-1 purposes. Counsel for the petitioner states that the AAO failed to take into account the essential function managed by the beneficiary and asserts that the record establishes that the supply chain is an essential function of the petitioner's organization.

The AAO will grant the petitioner's motion and reconsider the petitioner's claim that the beneficiary qualifies as a function manager.

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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 detailed position description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

On motion, the petitioner presents for the first time a detailed description of the "supply chain" function claimed to be managed by the beneficiary. A review of the record reflects that the petitioner made no prior reference to this specific function or the beneficiary's management of such function. Therefore, the petitioner has not supported a claim that the AAO's decision was incorrect at the time of the initial decision. 8 C.F.R. § 103.5(a)(2).

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'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). As the AAO discussed in its decision, the petitioner stated for the first time on appeal that the beneficiary oversees the work of hundreds of workers and now introduces a new function manager claim on motion. 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.

Furthermore, as discussed in the AAO's decision, the petitioner's descriptions of the beneficiary's duties, provided at the time of filing and in response to the director's request for evidence, were vague and a majority of the duties were non-qualifying. 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). 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). The petitioner failed to establish that the beneficiary will be performing primarily managerial duties and therefore did not support a claim that she is primarily managing an essential function of the organization. While the AAO's decision did not specifically address whether the beneficiary qualifies for the benefit sought as a function manager, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The AAO appropriately found that the petitioner did not meet that burden.

The record reflects that the beneficiary is a highly skilled employee with language skills and industry expertise that is critical to the petitioner's organization, as reflected by the petitioner's repeated reference to her role as a "managerial position with specialized knowledge." However, the record does not support the petitioner's claim that the beneficiary's role falls within the statutory definition of managerial capacity, either as a personnel manager or as a function manager. Accordingly, the AAO will affirm its prior decision.

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 AAO's decision dated December 27, 2011 is affirmed. The petition is denied.