



U.S. Citizenship
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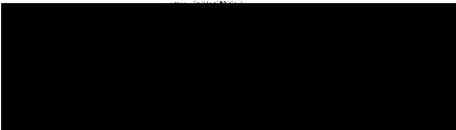
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File:  Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005

IN RE: Petitioner: 
Beneficiary: 

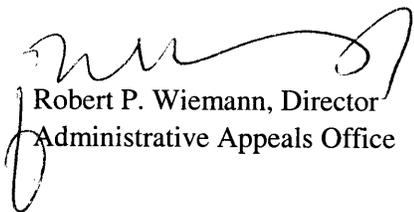
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the Commonwealth of Guam that is engaged in the provision of skydiving and commercial air transport services. The petitioner claims that it is the subsidiary of Tandem Skydive Saipan, Inc., located in the Northern Mariana Islands. The petitioner seeks to employ the beneficiary as its crew manager for a three-year period.

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, or that he has been employed in a qualifying capacity with the foreign entity.

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 disputes the director's decision and asserts that the beneficiary qualifies for classification as a managerial intracompany transferee based on his current and proposed supervision of professional staff. Counsel submits a brief in support of these assertions.

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 primary issue in the present matter is whether the beneficiary has been employed with the foreign entity and 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 June 21, 2001 letter submitted with the initial petition, the petitioner described the beneficiary's proposed job duties as follows:

As Crew manager, he will plan, supervise and administer the crew members of the Guam office in coordination with the Saipan office. He will also participate in the preparation of the crew members' duty roster reflecting scheduled flights and will assign crews according [sic]. [The beneficiary] will also prepare the budget and audit expense vouchers and related invoices.

[The beneficiary] is responsible for all aspects involving our crew members. He recruits, interviews, and hires crew members and plans and conducts crew orientation to foster a positive attitude toward company goals. The Crew Manager also conducts accident investigations and prepares reports for the insurance carrier.

With respect to the beneficiary's current qualifications, the petitioner stated that the beneficiary had served as crew manager with its Saipan-based affiliate since January 2000, and noted that through his work experience he "has obtained proprietary knowledge of all aspects of [the foreign entity's] business activities."

On July 27, 2001, the director requested additional evidence to establish that the beneficiary has been and will be employed in a qualifying managerial or executive capacity. With respect to the beneficiary's foreign employment, the director requested: (1) copies of the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the petition, the date the beneficiary was hired, the positions he has held, and an explanation as to why he was selected for the position with the U.S. entity; (2) the total number of employees at the foreign location where the beneficiary is employed; (3) an organizational chart for the foreign company including the names of all executives, managers and supervisors, and the names, job titles, brief job description, educational level, and annual salaries for all employees under the beneficiary's supervision; and (4) a detailed description of the beneficiary's duties abroad, including a list of all employees under his direction and the percentage of time the beneficiary spends in each of the listed duties. With respect to the beneficiary's proposed employment in the United States, the director requested: (1) the total number of employees at the U.S. location where the beneficiary will work; (2) an organizational chart for the United States company including the names of all executives, managers and supervisors, and the names, job titles, brief job descriptions, educational level and annual salaries for all employees to be under the beneficiary's supervision; (3) a list of all of the U.S. company's employees from the date of establishment to the present, including names, job titles, social security numbers, dates of employment, wages per week, immigration status and source of remuneration; and (4) a detailed description of the beneficiary's duties, including a description of the education and employment qualifications required for the position, evidence that the beneficiary meets the petitioner's requirements, job titles and position descriptions for the beneficiary's subordinates, and the percentage of time allocated to each listed duty.

The petitioner submitted a response, through counsel, which was received on September 17, 2001. In a letter dated September 14, 2001, counsel described the beneficiary's current duties with the foreign entity as follows:

[The beneficiary] is directly responsible for all instructors within the organization as well as all camera persons. He must oversee that [sic] safety and assign daily duties to all persons under his supervision as well as supervise safety procedures and all crew activities associated

with field/air activities. When necessary, [the beneficiary] also performs camera and Tandem activities.

Counsel explained that the beneficiary's "crew management experience makes him the ideal person to carry out the duties of the U.S. position as it requires someone to possess specialized knowledge and skills as well as someone with proprietary information of [the United States and foreign entities.]" Counsel further indicated that the beneficiary, in his role with the foreign entity, is directly responsible for six professional employees, including four skydiving instructors and two camera persons.

The foreign entity also submitted a letter from its operations manager, dated August 13, 2001, which confirms the beneficiary's employment:

[The beneficiary] worked for [the foreign entity] for a period of Fifteen months as a Crew manager, his duties were to assign our staff to there [sic] jump tasks for that day i.e. Tandem Jump or Video Jump, he was also an active Tandem master and cameraman, and proved to be excellent in both fields.

With respect to the beneficiary's proposed duties with the United States company, counsel indicated that his duties "will mirror those he has performed in the Saipan company." Counsel indicated that the beneficiary would be responsible for six professional skydiving instructors in the United States position. Counsel further explained that the duties of a crew manager "can only be performed by someone equipped with the necessary specialized managerial experience and skills, as well as someone with proprietary information of [the United States and foreign companies.]"

On September 27, 2001 the director denied the petition. The director determined that the beneficiary has not been and will not be employed in a managerial or executive capacity. Specifically, the director stated that the beneficiary has been and would be acting as a first-line supervisor of non-professional employees and therefore is not qualified for the benefit sought.

On appeal, counsel for the petitioner asserts that the director erred in concluding that the beneficiary's subordinates are not employed in a professional capacity. Counsel asserts the beneficiary "is supervising employees whose duties are specialized and complex and require the theoretical and practical application of a highly specialized nature as to qualify them as professionals." Counsel further states that "persons teaching the art of skydiving qualify for professional classification, as those relying on them as teachers/instructors no doubt rely on them to be professionals in their field. Thus, they should be categorized as 'professional,' as are teachers of other arts require the application of specialized knowledge."

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(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.*

In this case, the petitioner has asserted that the beneficiary's duties have been and will be in a managerial capacity, but submitted only a very brief, vague job description with the initial petition which failed to describe what duties the beneficiary would perform on a daily basis, and what percentage of his duties would be managerial. Accordingly, in the request for evidence, the director requested that the petitioner submit a comprehensive description of the beneficiary's duties, the percentage of time devoted to each duty, a description of the requirements for the position, evidence that the beneficiary meets the requirements, and a description of the job duties performed by the beneficiary's subordinates. In response, the petitioner merely repeated the brief job description submitted with the initial petition and failed to respond to the remainder of the director's request regarding the beneficiary's job duties. This evidence is critical as it would have established whether the beneficiary is in fact primarily performing duties that can be considered managerial in nature. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The letter from the foreign entity indicates that the beneficiary performs both managerial/supervisory and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the beneficiary is described as performing the duties of a tandem skydiving instructor and cameraman, and other duties, such as performing accident investigations, that do not fall directly under traditional managerial duties as defined in the statute. The AAO also notes that the beneficiary is classified as a "Sports Instructor" on his entry permit for the Commonwealth of the Northern Mariana Islands, which raises further questions regarding the true nature of his current duties. Based on the minimal information and evidence submitted to support the petitioner's assertions, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, the beneficiary is performing the duties of a skydiving instructor and camera person in addition to supervising such employees, which are tasks necessary to provide the services of the petitioner and foreign entity. 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).

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. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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. Although requested by the director, the petitioner did not provide the level of education required to perform the duties of its camerapersons and skydiving instructors. Again, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel for the petitioner states that the skydiving instructors supervised by the beneficiary should be categorized as teachers, and are therefore classifiable as professionals under the definition stated above. As a basis for this assertion, counsel asserts that the crewmembers supervised by the beneficiary apply highly specialized knowledge to ensure the safety of their clients and the crew. While the AAO does not doubt that the beneficiary's current and proposed subordinates are highly trained specialists, the petitioner has not established that these employees possess or require a bachelor's degree in order to perform their duties, such that they could be classified as professionals for the purpose of this petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). The petitioner has submitted no evidence on appeal to overcome the director's conclusion that the beneficiary has been and will be acting primarily as a first-line supervisor of non-professional personnel. Nor has the petitioner shown that any of the beneficiary's subordinates supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, 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.

Although the petitioner claims that beneficiary will serve as a manager based on his supervision of professional personnel, the AAO will also review the record to determine if the beneficiary could qualify 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. As noted above, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. As noted above, the beneficiary's responsibilities include many non-managerial duties, including supervising non-

professional personnel, and directly providing skydiving instruction and camera services. 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. Again, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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 has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel. Based on the evidence submitted, it cannot be found that the beneficiary has been or will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner indicated on Form I-129 that an individual, [REDACTED] is the 100 percent owner of the United States company and Tandem Skydive Saipan, Inc. The stock certificates and articles of incorporation for the petitioner indicate that [REDACTED] owns 51 percent of the company, while the 1998 and 1999 Forms 1120, United States Corporation Income Tax Return, indicate that [REDACTED] is the sole owner of the company's stock. The stock certificates and articles of incorporation for [REDACTED] Inc. indicate that [REDACTED] owned 51 percent of the company's stock in 1995 at the time of incorporation. However, the company's 1997 corporate tax return indicates that 76 percent of the company's stock is owned by one individual whose name is not provided. 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).

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Based on the inconsistent evidence regarding the ownership of the United States and foreign companies, the AAO is unable

to conclude that there is a qualifying affiliate relationship. 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).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the decision of the director will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.