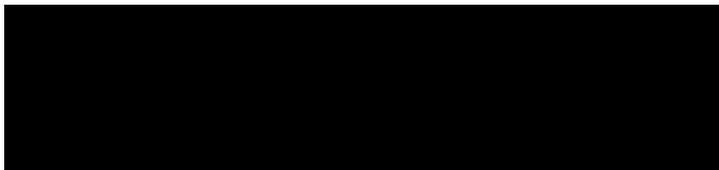


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U.S. Citizenship  
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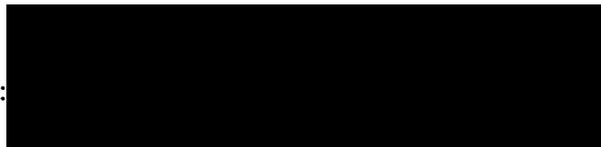
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D7

File: WAC 04 091 51247 Office: CALIFORNIA SERVICE CENTER Date: DEC 01 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, Texas 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, a corporation organized in the State of California that will engage in the sale of collectable minerals as well as the import and export of computer equipment, seeks to employ the beneficiary as its president. The petitioner claims that it is the subsidiary of [REDACTED] located in Parana, Brazil. The petitioner seeks to employ the beneficiary in the United States to open a new office.<sup>1</sup>

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 filed an appeal in response to the denial. On appeal, the petitioner submits a statement in which it asserts the beneficiary's qualifications, and contends that it supplied extensive documentation which clearly established that the beneficiary would be operating in a primarily managerial or executive capacity. It further asserts that the beneficiary will be acting in a primarily managerial or executive capacity by the end of the first year of operations based on the business plan provided.

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.

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<sup>1</sup> The AAO notes that on Form I-129, the petitioner indicated that it was *not* a new office. However, absent evidence that the petitioner had been doing business for the year prior to the petition's filing, the director determined that the petitioner met the definition of a "new office" as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F) and proceeded to adjudicate the petition on this basis.

- (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.
- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
  - (A) Sufficient physical premises to house the new office have been secured;
  - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
  - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
    - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
    - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
    - (3) The organizational structure of the foreign entity.

The primary issue in this 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 submitted a letter dated February 9, 2004 in which it discussed the beneficiary's qualifications for the U.S. position. Specifically, the petitioner stated that the beneficiary held a Bachelor's degree in Business Administration from [REDACTED] a Certificate of International Trade from the University of California at Berkeley, and had partially completed a Master's Degree in Economics at San Jose State University. The petitioner further discussed her duties while employed abroad for the foreign entity. Absent evidence that the petitioner was not a new office, however, the petitioner failed to submit a discussion of the U.S. entity's proposed business plan or the beneficiary's proposed duties while in the United States.

Consequently, the director issued a request for additional evidence on February 20, 2004. The request specifically asked the petitioner to submit documentation outlining the capital investment made by the foreign entity for the U.S. entity, a copy of the petitioner's proposed organizational chart outlining the organizational hierarchy of the entity, and the business plans for the petitioner. In a response dated April 9, 2004, the petitioner submitted the requested evidence, including a document entitled "Prospective US Business

Organization Chart" dated March 2004.<sup>2</sup> In this document, a description of the beneficiary's duties as president was provided under a heading that read "Organizational Chart 1." The document listed the beneficiary's duties as follows:

- Oversees operations in US and Brazil
- Trains, motivates, and retains organization
- Directly responsible for P&L and cash-flow of the business
- Legal, Accounting and Taxes
- Customer Support

A more detailed discussion of the beneficiary's duties was presented in a more detailed document entitled [REDACTED] "Accelerating International Trade." In this document, the petitioner indicated that a main focus of the petitioner's business was acquiring unique goods from Brazil and selling them for a profit on eBay. Specifically, the petitioner claimed that it had already sold more than 1,500 items, thereby earning it the title of "Power Seller" from the eBay rating system. The heading entitled "VI. Management Team and Organization," contained the following description of the beneficiary's role in the company:

[The petitioner] is managed by [the beneficiary], who is [ ] responsible for the companies' [sic] operations in the United States. [REDACTED] will be supervising the operations of [the petitioner] in Brazil. The company plans to hire part-time resources to help with the following processes:

- shipping & handling (clerks)
- listing (editor)
- pictures (photographer, graphic designers)

In addition to these resources, the company has retained [REDACTED] on a non-paying advisor capacity. . . .

\* \* \*

[The beneficiary] is responsible for [the petitioner's] operations in the U.S. [The beneficiary] has been a manager at [the foreign entity] for the past three years. At [the foreign entity], [the beneficiary] oversaw the companies' [sic] cash-flow and lately she spearheaded the search for new venture opportunities for the company. Within this capacity, [the beneficiary] founded and developed [the petitioner] in the U.S.

On April 19, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner would not reach the point where it could

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<sup>2</sup> The AAO notes that this submission also contained documents showing the future business plans and organizational charts for the petitioner for 2006 and 2008. Since the relevant period for purposes of eligibility in this matter is the first year of operations, these documents demonstrating the petitioner's projected future growth are not relevant for purposes of this analysis.

employ the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations since it appeared that the beneficiary would merely be involved in training, accounting, and customer service functions.

On appeal, the petitioner restates the beneficiary's qualifications and lists the regulatory definitions of both managerial and executive capacity. After listing each element of the definitions, the petitioner submits a brief explanation as to how the beneficiary's proposed duties conform to each of the provisions. Furthermore, the petitioner asserts that the beneficiary is planning to hire subordinate staff members and that, at the end of the first year of operations, she will consequently be functioning in a primarily managerial or executive capacity.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a qualified manager or executive by virtue of her position title, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive 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).

The description of the beneficiary's proposed duties, provided in the business plan, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "oversee operations," "trains, motivates and retains operations," and "legal, taxes and accounting" do little to clarify what the beneficiary will do on an average workday. The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of her time will be devoted to the operation of the business. For example, the business plan submitted in response to the request for evidence indicates that the petitioner intends to acquire unique items from Brazil which it will sell on eBay. The petitioner claims to have already sold more than 1,500 items, yet the petitioner acknowledges that the beneficiary is its sole employee. Since it is undisputed that the beneficiary will be the petitioner's sole employee until, as the petitioner notes in its business plan, cash flows from operations permit the hiring of other employees, the beneficiary will be responsible for all tasks associated with the listing and selling of items on eBay. As further noted by the petitioner, this process includes the listing of the items, photographing and advertising the items, and shipping and receiving the items, in addition to all other office-related tasks. 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).

It is evident, therefore, that without the required staff, the beneficiary will be required to perform the duties that would normally be delegated to subordinate employees in order to keep the business operational. The petitioner claims on appeal that the beneficiary "fully complies" with each aspect of the regulatory definitions is not persuasive in light of the petitioner's business and proposed business plan contained in the record. Although the petitioner asserts that the beneficiary will be acting in a primarily managerial capacity within one year of the approval of the petition, the petitioner provides no independent evidence to corroborate these

claims. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

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. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

At the time of filing, the petitioner contends that it is currently a "power seller" on eBay by way of its sale of more than 1,500 items to date. Since the beneficiary is the U.S. entity's sole employee, it is evident that she alone is responsible for these figures. The petitioner's business plan indicates that at the end of the first year of operations, the petitioner intends to hire three part-time employees to assist with the shipping and handling, photography and graphics, and listings. Three part-time employees does not appear to be sufficient to relieve the beneficiary from performing non-qualifying duties, particularly since none of the proposed employees is delegated to perform customer service functions, clerical or bookkeeping functions, administrative functions, or inventory. Consequently, the petitioner's proposed business plan is insufficient to convince the AAO that the beneficiary will be relieved from performing day-to-day, non-qualifying duties by the end of the first year of operations.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.