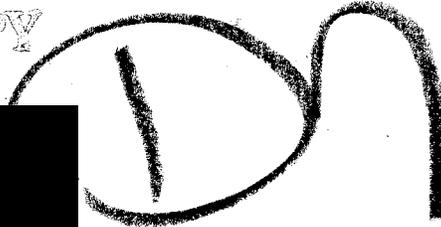




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FEB 15 2005

FILE: WAC 03 136 50962 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON 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 State of Delaware that is doing business as a manufacturer and distributor of lighting balloons. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Champs-Pres-Froges, France. The petitioner now seeks to employ the beneficiary as its executive vice-president for three years.

The director denied the petition concluding that the beneficiary had not been employed abroad and would not be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel states that the beneficiary would be employed in the United States as the petitioner's president. Counsel claims that the beneficiary would be performing "duties [that] are executive/managerial in nature," and which entail "directing the key functions of the company." Counsel also contends that the organizational hierarchy of the United States company demonstrates two layers of management that the beneficiary would supervise. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 issue is whether the beneficiary would 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), provides:

The term "managerial capacity" means 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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), provides:

The term "executive capacity" means 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 filed the nonimmigrant petition on March 26, 2003 noting that the beneficiary would be employed in the United States as the petitioner's executive vice-president. The petitioner also indicated on the petition that it employed five workers. Counsel stated in an attached letter, dated March 25, 2003, that the beneficiary's position would entail "extensive responsibility over the development and implementation of company business goals." In an additional letter from the petitioning organization, dated March 17, 2003, the general manager provided the following description of the beneficiary's position:

The Executive Vice President will manage and direct the expansion of [the petitioner's] presence. Specific duties include directing the execution of company policies to achieve that

goal in sales, marketing, human resources, finance and administration. He will direct the staffing of the company and will have the authority to hire or terminate employees. He will also consult with executives at [the petitioner's] headquarters in France.

The director issued a request for additional evidence on May 21, 2003 asking that the petitioner submit the following evidence: (1) an organizational chart of the United States company describing its managerial hierarchy and staffing levels and identifying the beneficiary's position in relation to all workers employed by the petitioner; (2) the names, job titles, and a job description of all employees supervised by the beneficiary; (3) a detailed description of the beneficiary's job duties in the United States organization; (4) an explanation as to how the petitioning company previously functioned without the beneficiary; and (5) the petitioner's Form DE-6, Quarterly Wage Report, for the last four quarters.

Counsel responded in a letter dated June 30, 2003, and provided a letter from the foreign entity, in which the chief executive officer outlined the following tasks for the beneficiary's proposed position:

- Review market analysis to determine needs of customers and ensure that company's range of services and products meets those needs;
- Review and coordinate financing of expansion plans;
- Hire and train salespeople for new markets;
- Develop relationships with distributors;
- Oversee performance of distributors;
- Supervise management of specific projects;
- Consult with senior management of parent company regarding expansion[.]

The chief executive officer stated that the beneficiary is needed in the petitioning organization as a result of the petitioner's decision to expand sales in the United States. The officer explained that the beneficiary would oversee the company's expansion both geographically and into new markets, including construction, special events, rescue and communication. The chief executive officer further explained that because of the beneficiary's "profound knowledge of the company products," he is qualified to manage the development of the organization.

Counsel submitted an organizational chart of the United States corporation identifying the beneficiary as the president with five direct subordinates: general manager, three senior sales managers, and an office coordinator. The chart also indicated that the petitioner employed four additional employees, including two production supervisors, a supply chain/service employee, and an Orlando office manager, and utilized technicians and free-lance workers.

In a decision dated July 15, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the description of the beneficiary's job duties "indicates that the beneficiary will be involved in substantially all aspects of the actual day to day duties rather than directing activities through managers, executives, or other professionals." The director concluded that the beneficiary would be directly providing the services of the business. Accordingly, the director denied the petition.

Counsel filed an appeal on August 12, 2003. In an attached brief dated August 5, 2003, counsel contends that the director erred in denying the petition because he did not consider all of the evidence submitted. Counsel

references the Foreign Affairs Manual, 9 FAM 41.54 N 8.2-1, and states "[t]he common theme is that the person seeking to be classified as an executive or manager must be primarily engaged in directing the major functions of the organization and have broad authority to do so." Counsel contends that the beneficiary's job description, which includes the six above-outlined tasks, "demonstrates that [the] beneficiary's duties are executive/managerial in nature." Counsel states:

The beneficiary would be making decisions as to what kinds of products and services the company would offer, who it would do business with, how it would finance its operations and who it would hire. He also would supervise the management of projects. *In other words, the beneficiary's job duties entailed directing the key functions of the company.*

(Emphasis in original). Counsel claims that the beneficiary's "executive/managerial" position is further supported by the company's organizational chart, which identified two layers of management to be supervised by the beneficiary. Counsel states that the chart indicates that the beneficiary would supervise managers, who in turn would oversee supervisors. Counsel explains that the supervisors would supervise lower-level employees and contractors.

Counsel also claims that the director's decision failed to take into account the beneficiary's proposed annual salary of \$120,000, which "is an indicator that the position is executive in nature," and that the beneficiary, a shareholder of 15% of the United States corporation, is also a member of the petitioner's board of directors. Counsel claims "[t]his evidence substantiates the idea that the beneficiary was involved in high-level management of the petitioning company."

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States company in a primarily managerial or executive capacity. 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

While the petitioner provided an outline of the tasks to be performed by the beneficiary, the petitioner does not clarify whether it is claiming to employ the beneficiary in a primarily managerial capacity under section 101(a)(44)(A) of the Act, or a primarily executive capacity under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ the beneficiary 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. Here, counsel states on appeal that the beneficiary's proposed job duties are "executive/managerial in nature," yet subsequently notes that the beneficiary's salary demonstrates that his position is "executive in nature." Counsel states that the beneficiary would hire employees and supervise the projects of subordinate managers and lower-level employees, which are typically deemed to be managerial job duties. *See* § 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). However, counsel also claims that the beneficiary would perform the executive duties of directing a function of the organization and would consult with the foreign corporation's headquarters. *See* § 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Counsel has failed to substantiate the claim that the beneficiary would be employed in both a managerial and executive capacity.

The record also fails to clearly indicate the beneficiary's proposed position in the company. The petitioner indicated on the petition that the beneficiary would assume the role of executive vice-president. Yet the petitioner indicated on its organizational chart and counsel identifies on appeal that the beneficiary would be employed as the company's president. The beneficiary's exact role in the organization is unknown. 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).

Whether the beneficiary is a managerial or executive employee also 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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. This information is relevant because several of the beneficiary's daily tasks, such as "review[ing] market analysis to determine needs of customers," "ensur[ing] the company's range of services and products meets [the customers] needs," and "developing relationships with distributors" do not fall directly under traditional managerial or executive duties as defined in the statute. Rather, based on these representations, it is reasonable to conclude that the beneficiary would devote at least a portion of his time performing the marketing function of the business. The AAO notes 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). As the petitioner has not documented the percentage of time spent on each task, the AAO cannot determine whether the majority of the beneficiary's time would be spent performing primarily qualifying job duties.

The beneficiary's employment in a non-qualifying capacity is further supported by the pertinent language in the Foreign Affairs Manual quoted by counsel on appeal. Section 9 FAM 41.54 N 8.2-1 states in relevant part:

a. An executive or managerial capacity requires a high level of authority and a broad range of job responsibilities. Managers and executives *plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals*. In determining whether an alien supervises others, independent contractors as well as company employees can be considered. The duties of a position must primarily be of an executive or managerial nature, and a majority of the executive's, or manager's time must be spent on duties relating to policy or operational management.

(Emphasis added). It does not appear from the beneficiary's job description that the beneficiary would "plan, organize, direct, and control [the] organization's major functions," specifically the marketing function, through other workers. Moreover, although counsel claims that the petitioner's sales function is performed by the senior sales managers, it would seem that the beneficiary would participate in the petitioner's sales, as he would be responsible for ensuring that the company's products meet the needs of its customers.

In addition, while counsel relies heavily on the organizational chart to support the petitioner's claim that the beneficiary supervises two layers of management, there is no evidence that the petitioner actually employs the nine employees named on its organizational chart. The petitioner indicated that it had five employees at the time petition was filed in March 2003. While the company's payroll records reveal that it had six employees

as of March 31, 2003, five of the employees named on the organizational chart, including all three senior sales managers, one of the two production supervisors, and the Orlando office manager, do not appear in any of the submitted payroll documentation. 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, in the request for evidence, the director requested that the petitioner submit a job description for all employees to be supervised by the beneficiary. The petitioner failed to submit this evidence in its response. This evidence is critical as it would have established whether the beneficiary would supervise a subordinate staff of managers, supervisors or professionals who would relieve him from performing primarily non-qualifying duties. 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). Therefore, although the petitioner's organizational chart lists many employees with managerial and supervisory job titles, there is no evidence to suggest that the petitioner in fact employs all of the employees represented on the chart, or that they are performing duties that would be considered managerial, supervisory or professional.

Furthermore, while 9 FAM 41.54 N 8.2-1(a) allows for the consideration of independent contractors when determining a beneficiary's employment capacity, the record does not contain documentary evidence demonstrating the petitioner's use of its claimed free-lance workers or technicians. Again, the record does not demonstrate that the beneficiary would be performing primarily qualifying job duties.

Lastly, counsel claims on appeal that both the beneficiary's salary and his ownership of 15% of the organization are evidence of the beneficiary's employment as "high-level management." Counsel fails to recognize that "neither the title of a position nor ownership of the business are, by themselves, indicators of managerial or executive authority." 9 FAM 41.54 N8.2-1. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The actual duties themselves reveal the true nature of the employment. *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).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The director further stated in his decision that the petitioner did not establish that the beneficiary has been employed in a primarily managerial or executive capacity. As the director did not specifically address the beneficiary's employment in the foreign entity, it is unclear from the director's decision whether he is referring to the beneficiary's employment abroad. However, because the instant matter involves a nonimmigrant petition for new employment, it is reasonable to conclude that the director determined that the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity. Other than noting the beneficiary's position as the general manager of the foreign organization, counsel does not address on appeal the beneficiary's foreign employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director's decision will therefore be affirmed. For this additional reason, the appeal will be dismissed.

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.