

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

D 7



File: WAC-03-048-52781 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 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 extend the employment of its CEO/Managing Director/Creative Director 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 California that is engaged in the business of interactive media solutions, including web design and market research. The petitioner claims that it is the subsidiary of [REDACTED] located in Nacka, Sweden.

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 for the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. In support of this assertion, counsel submits a brief statement on Form I-290B. While counsel indicated on Form I-290B he would be submitting a brief and/or additional evidence within 30 days of filing the appeal, as of the date of this decision, the AAO has received no further documentation or correspondence from counsel or the petitioner.

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 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 November 25, 2002 letter submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

1. Act as Chief Administrative Officer to plan, develop and establish policies and objectives of the company;
2. Coordinate functions and operations between divisions and departments, to establish responsibilities and procedures to attain objectives;
3. Review activity reports and financial statements to determine progress towards goals;
4. Revise objectives and plans in accordance with current conditions;
5. Plan and develop production, labor, and public relations policies designed to improve company image and relations with customers and employees;
6. Direct and coordinate all activities involved with promotion and sales of services offered;
7. Determine services to be offered based on demand and customer reaction to services performed and current market conditions;
8. Negotiate for equipment and products for production;
9. Through subordinate managerial personnel, establish policies to utilize human resources, equipment and material productively;
10. Develop basic presentation approach for company representative to utilize in layout design and copywriting;
11. Confer with department heads to discuss client requirements and scheduling;
12. Coordinate creative activities;
13. Review and approve all projects and materials developed by staff prior to final presentation to client for approval.

[The beneficiary] is familiar with the product and services to be offered, as well as being a successful and sought-after designer . . . . Although his time in the US will be devoted to the commencement and management of the US office, his dual position as Creative Director allows him to supply the necessary input to guide the company to where it wants to go in such a hot and competitive market.

On February 3, 2003, the director requested additional evidence. Specifically, the director requested: (1) an indication of the total number of employees of the petitioner; (2) a more detailed description of the beneficiary's duties in the United States, including an indication of the beneficiary's subordinates and their titles and duties, and the beneficiary's day-to-day duties over the last six months; (3) copies of the petitioner's quarterly State wage reports for the previous four quarters, including the names, social security numbers, and number of weeks worked for each employee; (4) copies of the petitioner's Forms 941, Quarterly Wage Report, for the previous four quarters; (5) copies of the petitioner's payroll summary, Forms W-2 and Forms W-3 showing wages paid to employees; (6) a list of specific discretionary decisions that the beneficiary exercised over the previous six months and evidence that the higher level executives, the board of directors, or stockholders of the petitioner require only general supervision of the beneficiary; and (7) signed copies of the petitioner's 2002 federal income tax documents.

In a response dated April 24, 2003, the petitioner submitted: (1) a statement further describing the beneficiary's duties and those of his alleged subordinates; (2) copies of the petitioner's California State Forms DE-6 for the fourth quarter of 2001 and the third quarter of 2002; (3) copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for the four quarters of 2002; (4) a copy of the petitioner's 2002 Form W-3; (5) a copy of the beneficiary's 2002 Form W-2; (6) a copy of the petitioner's 2002 Form 1120, U.S. Corporate Income Tax Return and accompanying schedules; and (7) copies of documents reflecting that the petitioner employed an unpaid intern for the summer of 2002. In the attached statement, the petitioner described the beneficiary's duties as follows:

[The beneficiary] manage[s] and control[s] not only the entire function of the [petitioner] but also the entire operation of both companies in their entirety . . . . [The beneficiary has] the utmost decision-making power who [sic] serves as the brain and heart of the entire company. [He has] the discretionary power to hire or fire any employee within the company, to create a new department within the corporation or to completely shut down the entire operation. [He has] the discretionary power over day-to-day operations of [the petitioner], and [has] the ability to makes decisions of utmost importance in relation to the company and its proper functioning. [He has] the power to deny any and all suggestions or decisions by other managerial or professional personnel of the company if inappropriate or not feasible for the company's ultimate success.

The petitioner provided a lengthy list of duties that the beneficiary will perform. As this list is part of the record, it will not be fully quoted herein. Among the entries on the list, the petitioner stated that the beneficiary will "establish policies of the company and ensure that they are strictly followed by [the] company's professionals such as Print Art Director, Website Art Director, and other professionals of the company." The petitioner provided that the beneficiary will "coordinate and control functions and operations between divisions of the company to make sure that all divisions are interrelated and that they are following and complying with their specific objectives and procedures." The petitioner stated that the beneficiary will "evaluate activities of professional employees to determine progress towards goal." The petitioner indicated that the beneficiary will "exercise full discretionary decision-making power in directing and coordinating all activities involved with promotion and services offered by the company."

The petitioner described its staffing as follows:

The current number of employees at the [petitioner] where the Beneficiary will be employed is three, although it is expected to increase up to eight by the end of the year 2003.

Note that at the present time [the petitioner has] the following employees in the US:

1. Print Art Director - . . . [The beneficiary's wife] is currently not receiving any remuneration from the [petitioner] because of the many problems [it] had in trying to stay in business. She is currently working on a volunteer basis . . . . She is devoting full time efforts to the company. Her duties include:

- a. Formulating concepts for customer projects and supervising workers engaged in executing layout designs for art work and copy to be presented by visual communications media (much of this supervision is supervising the employees in Sweden who are preparing project designs), such as the Internet and print media.
- b. She reviews illustrative materials and confers with clients and [the beneficiary], regarding budget, background information, objectives, presentation approaches, styles, techniques, and related production factors.
- c. She formulates basic layout design concepts for printing and conducts research to select and secure suitable illustrative material.
- d. She conceives and assigns production of material and detail to artists and photographers for extra details and optimum success of the company.
- e. She assigns and directs staff members both here in the US and in Sweden to develop design concepts into art layouts and prepares layouts for printing.
- f. She reviews, approves, and presents final layouts to [the beneficiary] for approval.

2. Website Art Director - . . . [The petitioner employs] an intern who has selflessly dedicated her time and creativity to the success of our company as well without any remuneration. She is performing the following duties, emphasizing website development, and creating attractive and irresistible websites for our clients, in designing captivating banners, and creating and developing concepts that would keep our company successful despite competition.

- a. Formulating concepts for customer projects and supervising workers engaged in executing layout designs for art work and copy to be presented by visual communications media such as the Internet.
- b. She reviews illustrative materials and confers with clients and [the beneficiary], regarding budget, background information, objectives, presentation approaches, styles, techniques, and related production factors.
- c. She formulates basic layout design concepts for websites and conducts research to select and secure suitable illustrative material.

- d. She conceives and assigns production of material and detail to artists and photographers for extra details and optimum success of the company.
- e. She assigns and directs staff members both here in the US and in Sweden to develop design concepts into art layouts and prepares web layouts.
- f. She reviews, approves, and presents final layouts to [the beneficiary] for approval.

On August 28, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that the petitioner's documentation reflects that the beneficiary is the sole paid employee, and that no wages were paid in 2002. The director found that "[t]here is no evidence on record of a subordinate staff of professional, managerial or supervisory personnel to relieve the beneficiary from performing non-managerial duties." The director further stated that "[t]he record does not establish that the U.S. entity contains the organizational complexity to support an executive position."

On appeal, counsel for the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, counsel states that "[e]vidence was presented demonstrating that subordinate staff will relieve the Beneficiary from performing non-managerial duties, and therefore, the Beneficiary's duties are primarily managerial or executive in nature." Counsel further asserts that "[m]erely because the company's other employees are currently not receiving any remuneration and perform their duties on [a] voluntary basis does not disqualify them from being valid company employees." Counsel finally states that "[i]t must be noted that this is an internet company and the 'dot com' crisis has affected this company as well. Therefore, the company needs to be given an opportunity to establish itself during this crisis and move forward." The petitioner provides no new evidence to support these assertions.

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

In the instant case, the petitioner does not clearly specify whether the beneficiary will perform managerial or executive tasks. Counsel repeatedly states that the beneficiary's duties are "managerial or executive." The petitioner indicates that the beneficiary's duties include elements of the statutory definition of executive capacity, such as establishing goals and policies, and exercising wide latitude in discretionary decision-making. Yet the petitioner discusses the beneficiary's managerial authority over subordinate employees, and ability to hire and fire employees. Thus, it appears that the petitioner intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive

duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

As stated above, in response to the director's request for evidence, the petitioner provided a lengthy list of duties that the beneficiary will allegedly perform. This list indicates that the beneficiary will have supervisory authority over a "Print Art Director," "Website Art Director," and "other professionals of the company." The statement of the beneficiary's duties indicates that his subordinates will execute many tasks that he will review and manage. However, as noted by the director, the petitioner has not documented that it employs a subordinate staff as described. Evidence in the record reflects that the beneficiary is the petitioner's sole employee who receives compensation. The petitioner further submitted evidence to show that it utilized the services of an unpaid intern for 12 hours per week during the summer of 2002. The record contains no documentation to reflect that the intern continued to serve as the petitioner's Website Art Director as of November 27, 2002, the date of filing the petitioner, and no further documentation to establish that the petitioner employs a "Print Art Director" or "other professionals." While the petitioner indicates that the beneficiary's spouse works as the Print Art Director on an unpaid basis, the petitioner has submitted no documentation to establish this fact other than its own statements. 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).

Counsel correctly states that "[m]erely because the company's other employees are currently not receiving any remuneration and perform their duties on [a] voluntary basis does not disqualify them from being valid company employees." However, the fact that the petitioner utilizes unpaid labor does not relieve it from the burden to prove that such employees actually provide services to the company. Again, 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. at 190. Thus, the record as presently constituted serves only to establish that the beneficiary is the petitioner's sole employee.

The petitioner has failed to show that it employs a staff as described. As many of the beneficiary's duties involve the management and supervision of multiple staff members, the accuracy of the petitioner's description of his duties is in question. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Thus, the petitioner's description of the beneficiary's job duties is not sufficient to establish that he will be employed in a primarily managerial and executive capacity.

In the absence of sufficient subordinate staff members, it is evident that the beneficiary must perform numerous non-managerial and non-executive tasks. 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 section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for 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). As required by

section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner operates as a provider of interactive media solutions, including web design and market research. It is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as designing websites and print media materials, marketing the petitioner's services to potential and existing clients, answering questions about the petitioner's services, managing a checking account and paying bills, and answering the telephone. As the beneficiary is the sole documented employee of the petitioner, the record reflects that he must perform all of these non-qualifying tasks. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. 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). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner indicates that its staffing will increase to up to eight employees in the near future. Further, counsel states that "[i]t must be noted that this is an internet company and the 'dot com' crisis has affected this company as well. Therefore, the company needs to be given an opportunity to establish itself during this crisis and move forward." However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). There is no provision in the regulations that provides an exception due to economic challenges.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this 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. The petitioner has not met this burden.

**ORDER:** The appeal is dismissed.