

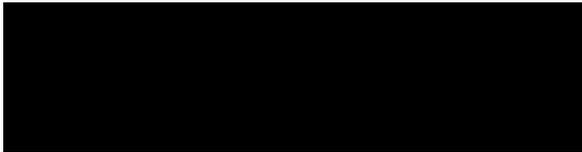
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

D7



File: WAC-04-153-50160 Office: CALIFORNIA SERVICE CENTER Date: JUL 20 2005

IN RE: Petitioner:
Beneficiary:



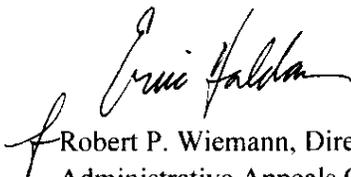
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 The director's decision will be withdrawn and the matter remanded for further consideration and a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President 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 develops electronics and semiconductors for export to Japan. The petitioner claims that it is the branch¹ of [REDACTED] located in Tokyo, Japan. The beneficiary was initially approved for L-1A status in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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 beneficiary is eligible for L-1A classification and the petition should be approved. In support of this assertion, counsel submits a brief and documentation previously entered into the record of proceeding.

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 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;

¹ The petitioner indicated on Form I-129 that it is a branch of the foreign entity. However, the petitioner's supporting documentation reflects that the foreign entity owns 100 percent of the petitioner's stock. Accordingly, the petitioner is a subsidiary of the foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(K).

- (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 letter submitted with the initial petition on May 5, 2004, the petitioner described the beneficiary's job duties as follows:

Since 1999, [the beneficiary] has been President exercising executive functions. [The beneficiary] has directly supervised and educated Petitioner's four employees. In addition, in acting as a liaison with the US associated companies, [the beneficiary] makes regular contacts with those companies and product recommendations as well as future prospects of new technological products to customers. [The beneficiary's] duties also include directing advertisements, marketing, and internal and external presentations introducing new featured products and general services offered by Petitioner. More specifically, [the beneficiary] exercises his discretionary authority as President in managing customer relations on behalf of Petitioner in that he makes decisions as to which new business solution identified through discussions with customers and the sales staff should be implemented, as well as in hiring and firing Petitioner's employees. Furthermore, [the beneficiary's] day-to-day duties include meeting with various vendors and prospective customers inside and outside of the office, formulating short and long term goals of the company, devising business strategies, attending trade shows, and overseeing and managing issues pertaining to the company's finances and marketing. In playing an informational role to [the foreign entity] in Tokyo, [the beneficiary]

sits as an integral intermediary for purposes of business communications between [the foreign entity] and the US associated companies.

The petitioner submitted an organizational chart that reflects that it employs four individuals including the beneficiary, and it utilizes the services of outside companies. The petitioner provided copies of its IRS Form 941, Employer's Quarterly Tax Return, and California Form DE-6 for the fourth quarter of 2003 that show that it employed the beneficiary and one other individual during the covered period. The petitioner submitted a Michigan State quarterly report for the fourth quarter of 2003 that shows that it employed a third individual during the covered period.

On May 12, 2004, 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. The director noted that no employees have been identified for two of the four departments under the supervision of the beneficiary. The director stated that "[i]t appears from the U.S. organizational chart and from the duties described that the beneficiary has been and will continue to be performing practically all of the day-to-day operations of the business." The director further stated that "[t]he information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties to be performed by the beneficiary, and the percentage of time devoted to these duties." The director found that "[t]he petitioner has not shown that the beneficiary would be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties."

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial and executive capacity. In a brief, counsel discusses the beneficiary's duties and accomplishments with the petitioner. Counsel asserts that the beneficiary "manages at least three major, essential and critical functions (strategic planning, marketing and customer relations) of [the petitioner]." Counsel states that the beneficiary "functions at a very senior level with regard to the functions he manages and exercises executive direction over all of Petitioner's vital functions." Counsel adds that the beneficiary has authority over the petitioner's hiring and firing. Counsel states that the petitioner's staffing should only be used as a basis for the director's decision if considered in light of the petitioner's reasonable needs and stage of development. Counsel asserts that "present staffing levels are entirely reasonable at the [petitioner's] present stage of development and are not a proper basis for denial of the Petition." Counsel further asserts that the beneficiary is not required to supervise other personnel where he manages an essential function. Counsel states that the beneficiary does not perform the tasks necessary to produce the petitioner's products or provide the petitioner's services. Counsel asserts that the director's conclusions regarding the beneficiary's role and duties are unsupported by facts contained in the record of proceeding, and that the petitioner has submitted a detailed account of the beneficiary's duties.

Upon review, the director's decision will be withdrawn and the matter remanded for further consideration and a new decision.

The regulation at 8 C.F.R. § 214.2(l)(14)(i) states the following:

The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is a request for an extension of the beneficiary's L-1A status, and it does not involve the opening of a new office, the petitioner was not required to submit supporting documentation. 8 C.F.R. § 214.2(l)(14)(i). However, the petitioner provided numerous items of evidence with Form I-129. The director examined the petitioner's evidence and determined that the petitioner failed to establish eligibility. The director's decision was based on a finding that the petitioner did not submit sufficient documentation. For example, the director noted that the beneficiary's job description does not include adequate detail, and that the petitioner did not show that each its four departments employ staff members. The director further observed that the record does not establish that the beneficiary's subordinates will be professional, managerial, or supervisory personnel, or that they will relieve the beneficiary from performing non-qualifying duties. The director did not point to any clear evidence of ineligibility in the petitioner's documentation, but rather found that the documentation was inadequate to fully establish eligibility.

As the director did not find direct evidence of ineligibility in the record, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence" 8 C.F.R. § 103.2(b)(8).

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. As noted by the director, the beneficiary's job description does not clearly show that he will be employed in a primarily managerial or executive capacity. While the petitioner has described the beneficiary's duties and authority in general terms, the job description does not show what actual tasks the beneficiary will perform on a daily basis. The petitioner should provide more detail regarding how the beneficiary will spend his time, including a breakdown of the percentage of his weekly hours that will be devoted to his various duties.

By way of example, general statements such as "the beneficiary will spend 20 percent of his time on financial matters" are not sufficient. The petitioner should explain in detail what financial documents the beneficiary prepares, whether and how the beneficiary works with subordinate employees on financial tasks, whether such tasks include administrative duties such as paying routine bills and managing a checking account, the level of authority the beneficiary exercises over financial decisions, and whether the beneficiary utilizes the services of outside accountants. If the petitioner claims that it does use accountants on a contract basis, it should provide evidence in the form of service agreements and documentation of payments made.

The beneficiary's job description contains duties that, without further explanation, appear to be non-managerial and non-executive. The petitioner stated that "[the beneficiary] makes regular contacts with . . . companies and [makes] product recommendations as well as [suggests] future prospects of new technological products to customers." The petitioner should clearly explain this duty and distinguish whether it is a sales and marketing function or executive or managerial function. The petitioner stated that "[the beneficiary's] day-to-day duties include meeting with various vendors and prospective customers inside and outside of the office." The petitioner should describe in detail the nature of the beneficiary's interaction with vendors and customers, including the time he will devote to this task.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it is permissible for the beneficiary to perform some non-qualifying duties, the petitioner bears the burden to establish that the majority of his time will be devoted to managerial or executive tasks. The beneficiary's job description does not provide sufficient detail in order for Citizenship and Immigration Services (CIS) to determine whether he will be employed in a primarily managerial or executive capacity.

As correctly observed by counsel, the beneficiary is not required to supervise personnel, and the petitioner's staff size is not determinative of the petitioner's eligibility. However, the petitioner provides that that beneficiary will have supervisory authority over four subordinate employees. Thus, it is evident that the beneficiary must commit a portion of his time to supervising them. In order for the petitioner to establish that the beneficiary's supervisory tasks constitute managerial duties under section 101(a)(44)(A) of the Act, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 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 a 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.

In the instant case, the petitioner has not provided clear evidence of the number of individuals it employed as of the date of filing the petition. The petitioner references that the beneficiary "directly supervised and educated Petitioner's four employees," yet on Form I-129 the petitioner indicated that it employs four individuals including the beneficiary. The petitioner's organizational chart reflects that it employs four individuals including the beneficiary. The petitioner's California Form DE-6 for the fourth quarter of 2003 shows that it employed the beneficiary and one other individual during the covered period. The petitioner submitted a Michigan State quarterly report for the fourth quarter of 2003 that shows that it employed a third individual during the covered period. Thus, as of December 31, 2003, it appears that the petitioner had only three employees.

As the petition was filed on May 5, 2004, State and federal quarterly reports should be available for the second quarter of 2004 to show the number of individuals employed by the petitioner at the time the petition was filed. The petitioner should submit its IRS Form 941, Employer's Quarterly Tax Return, California Form DE-6, and any other quarterly State filings for the second quarter of 2004, including all attachments. The petitioner should submit documentation of its payroll covering at least the three months immediately preceding the date the petition was filed as evidence of the number of individuals it employed as of the filing date. If the petitioner claims that the beneficiary has supervisory authority over contract employees, it should provide evidence of such, including service agreements, documentation of payments made, clear descriptions of the services provided, and the nature of supervision required of the beneficiary.

The evidence of record contains no indication of the duties of the beneficiary's subordinates. The petitioner should provide a complete list of individuals that the beneficiary will supervise, including a description of each employee's duties, educational background, and supervisory responsibility. The petitioner's organizational chart shows that one of the beneficiary's subordinates is titled Manager, Marketing & Sales. The petitioner should clearly describe this individual's managerial authority such that CIS can determine if he is a manager as contemplated by section 101(a)(44)(A)(ii) of the Act.

If the beneficiary's subordinates are deemed not to be supervisory, professional, or managerial, the beneficiary may still qualify as a managerial or executive employee. However, time he invests in supervising them will not be considered time acting in a managerial or executive capacity. Again, the petitioner bears the burden of showing that the majority of the beneficiary's time will be devoted to managerial or executive tasks.

Counsel suggest that the beneficiary qualifies as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is

primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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). In this matter, the petitioner has not provided sufficient evidence that the beneficiary manages an essential function. If the petitioner contends that the beneficiary is a function manager, it should clearly describe the essential function managed by the beneficiary, and submit a detailed explanation of how the beneficiary is relieved from actually performing the day-to-day tasks associated with the function. Merely serving as the manager over an entire business does not constitute managing an essential function. Greater explanation and evidence are required.

It is further noted that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, May 5, 2004. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner meets the requirements for L-1A classification as of the date of filing the petition. Accordingly, the director's decision will be withdrawn, and the petition will be remanded. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated May 12, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.