

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

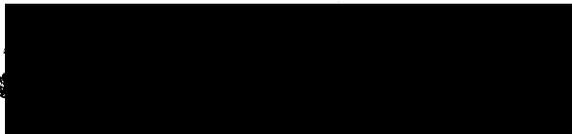
U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D7

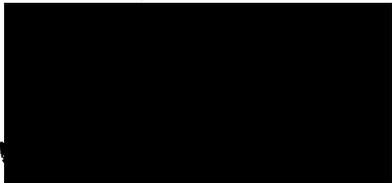


FILE: SRC 03 242 55375 Office: TEXAS SERVICE CENTER Date: JUN 10 2005

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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was established in 2001 and claims to be in the business of exporting computers and accessories. The petitioner claims to be a subsidiary of Logic Computer S.R.L., located in [REDACTED]. It claims two employees and a gross annual income of \$74,000.00. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for three years, at a yearly salary of \$30,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a qualifying managerial or executive capacity.

On appeal, counsel states that the evidence submitted is sufficient to establish that the beneficiary will be performing duties that are primarily managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 in this proceeding is whether the petitioner has established that the beneficiary will be employed 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) 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), 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.

In a letter of support, the petitioner described the beneficiary’s proposed duties as:

[The beneficiary] has been in charge of establishing goals and standards of our company in terms of strategic associations to create internal procedures. [The beneficiary] has day-to-day discretionary authority in coordinating and directing the work of our company. [The beneficiary] implements administrative and operational policies and procedures for our company. His position include[s] setting and reviewing corporate objectives, directing the expense controls of the company, including outsourcing services, identification and development of business opportunities and project feasibilities.

Counsel submitted a written memorandum in which he asserted that the beneficiary's duties included directing the management of the organization, establishing the company's goals and policies, and exercising a wide latitude in discretionary decision-making. Counsel also asserted that the beneficiary establishes standards to create internal procedures.

The director determined that the evidence was insufficient to show that the beneficiary's proposed duties would be primarily managerial or executive in nature. The director stated that many of the beneficiary's proposed job duties had not been established as intrinsically managerial. The director further stated that the petitioner had failed to establish that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the business. The director also stated that it was not realistic for a business with two employees to employ both of its workers in a strictly managerial position, with no one to perform the day-to-day non-managerial tasks.

On appeal, counsel disagrees with the director's decision. Counsel infers that the beneficiary will be employed by the U.S. entity in a functional manager position.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. 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 petitioner cannot claim that some of the duties of the position entail executive responsibilities, while others consist of managerial duties. In the instant matter, the petitioner has failed to distinguish the beneficiary's managerial versus executive duties. For example, the petitioner describes the beneficiary's duties as managerial in that he directs outsourcing services, and executive in that he is responsible for establishing company goals and standards.

Further, 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). In the instant matter, the record shows that the beneficiary will be primarily performing the marketing and sales functions of the business rather than primarily performing managerial or executive duties. Consequently, there is insufficient evidence to show that the beneficiary will perform the high level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too broad to establish that the preponderance of his duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: establishing goals and standards, coordinating and directing the work of the company, implements administrative and operational policies and procedures, and setting and reviewing corporate objectives. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objectives of the director. 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). In intracompany transferee matters, the actual duties themselves reveal the true nature of the employment. *Id. at 1108*.

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "directing the management of the organization, establishing the company's goals and policies, and exercises wide latitude in discretionary decision making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as, administration and marketing of the petitioner's business do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Due to the petitioner's failure to provide any specific details on the breakdown of the beneficiary's daily or weekly duties/job functions, the petitioner has not demonstrated that the beneficiary primarily manages an essential function of the U.S. entity. 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 A.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 evidence that the beneficiary manages an essential function. There is nothing in the record to demonstrate any function managed by the beneficiary. Furthermore, there is nothing in the record to show that the U.S. entity employs subordinates to perform the functions of the organization.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the services of the U.S. entity rather than serving as a functional manager. In the instant matter, the record demonstrates that the U.S. entity employs two employees, the beneficiary and a sales manager, and no other subordinate employees. It can only be assumed, and has not been proven otherwise, that the beneficiary is performing the day-to-day tasks associated with the sale and export of computers and accessories. 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 record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position, nor is there sufficient evidence to show that multiple managers are necessary to sustain the U.S. entity. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the director's decision, it should be noted for the record that there has been insufficient evidence submitted to demonstrate that the U.S. entity will be in a position to remunerate the beneficiary for his services pursuant to 8 C.F.R. § 214.2(I)(14)(ii)(E). The IRS Form 1120, U.S. Corporation Income Tax Return for the year 2002 shows that there was no compensation of officers and no salaries or wages paid for that year. In addition, IRS Form 1120 for the first and second quarters of 2003 shows that the beneficiary was only paid a total of \$6,000.00 for this six month period. The petitioner states in the record that the beneficiary's salary is \$30,000 per year. Based upon the evidence submitted it does not appear that the petitioner is in a position to remunerate the beneficiary for his services or that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as manager or executive. For this additional reason, the petitioner 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 entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.