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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 083 50186 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 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 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 its general manager as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California. The petitioner claims on the nonimmigrant petition that it is a branch of the beneficiary's foreign employer, located in Kowloon, Hong Kong. The petitioner now seeks to extend the beneficiary's employment for an additional three years.

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

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel submits a brief and claims that Citizenship and Immigration Services (CIS) based its denial on a "misapplication and misinterpretation of the regulations governing this petition." Counsel states that the beneficiary "manages an essential function within the company in that she is responsible for all the import activity between the corporation and its clients." Counsel further states that the beneficiary also functions at a senior level within the organization as "she is solely responsible for negotiating contracts and establishing policies to further the growth of the company's import business." 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 in this proceeding 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 instant petition on January 15, 2003, noting that the beneficiary would be employed as the general manager of the United States entity. On the Form I-129 Supplement, the petitioner explained that the beneficiary's job duties in this capacity would include: (1) ensuring the establishment and growth of the United States business; (2) distributing the petitioner's products to local wholesalers, chain stores and retailers; (3) managing the company's marketing managers and sales representatives; (4) increasing imports and exports between the United States, Hong Kong and China; (5) increasing company sales; (6) planning and

participating in corporate exhibitions; (7) corresponding with importers, wholesalers, chain stores and retailers; (8) visiting customers and buyers; (9) coordinating activities with local and offshore factories, customs brokers and shipping agents; (10) confirming product specifications; and (11) supervising personnel actions. The petitioner stated that the beneficiary would exercise a wide latitude of discretionary decision-making powers and would receive only general supervision from the company's president.

In addition to the petition, counsel submitted documentation previously provided to CIS in connection with the petitioner's prior petition for the beneficiary's L-1A classification. Included in this documentation was a letter from the foreign entity, wherein its president provided the following description of the beneficiary's position in the United States:

In her capacity as General Manager, she will be responsible for ensuring the establishment and growth of the import function of the business. To promote the escalation of the company's import activity she will amend and formulate policies, establish methods for coordinating staff members, and negotiate contracts with clients on the company's behalf.

[The beneficiary] will be vested with wide latitude of discretionary powers. She will have the authority to recommend personnel actions, such as hiring, firing and promoting of the employees. She will also negotiate and enter into binding agreements with independent contractors, such as accountants and sales representatives. She will answer only to the President of the company and provide monthly evaluations and recommendations.

The director issued a request for evidence on March 25, 2003 asking that the petitioner submit the following evidence in support of the beneficiary's managerial or executive employment in the United States entity: (1) the petitioner's organizational chart describing its managerial hierarchy and staffing levels and clearly identifying all employees, particularly those subordinate to the beneficiary; (2) a brief description of the job duties, educational levels, annual salaries, and immigration status for all employees supervised by the beneficiary; (3) a detailed description of the beneficiary's job duties in the United States entity, identifying who the beneficiary directs and the percentage of time the beneficiary would devote to each named task; and, (4) copies of the petitioner's California Form DE-6, Quarterly Wage Report, for the last two quarters.

Counsel responded in a letter dated June 11, 2003. In response, counsel submitted an organizational chart for the petitioning organization, in which the beneficiary, identified as the general manager/secretary, was listed as a subordinate of the company's president/chief executive officer and owner, and as the manager of an independent accountant, a purchasing/warehouse coordinator, and four salespersons. In an attached document from the petitioner, the company's president outlined the following job duties of the beneficiary as general manager:

- Responsible for ensuring the establishment and growth of the company.
- Amending and formulating policies.
- Establishing methods for managing staff members such [a]s the marketing manager & sales persons.
- Responsible for the escalation of import and export [a]ctivities between the United States, Hong Kong, China [a]nd Philippines.
- Promote the growth of the company sales. Planning traveling, and joining exhibition programs.

- Communicate and correspond with clients.
- Speak and write fluent English, Chinese, Cantonese, tagalog languages.
- Has the authority to recommend personnel actions such as hiring, firing and promoting of the employees.
- Will exercise a wide latitude of discretionary decision making powers.
- Receiving general supervision or direction only from [t]he president and will report to the president directly.

In another letter from the petitioner's president, dated May 30, 2003, the president explained the following additional responsibilities of the beneficiary in the United States entity:

- Responding on daily incoming and outgoing faxes, letters and e-mails.
[The beneficiary] is responsible in corresponding and communicating with the local [c]ustomers, sales representatives and vendors. She responds to daily incoming and [o]utgoing faxes, letters, and e-mails. She also [does] the price quotation sheet, issuing [o]f sales confirmation, and purchase order. She can speak, read and write English [f]luently. She also communicates [with] local vendors as well as in Hong Kong, China [a]nd Philippines. She has developed a very good relationship with the buyers, owners, [s]ales persons and vendors. She would spent [sic] 2-3 hours each day on this duty.
- Supervise the sales persons/representatives
She contacts independent sales persons daily to check/review orders or new products [s]tatus. She prepares new products for the sales persons to present the local chain stores, [w]holesalers, and other mass market. She would direct and coordinate products development with the sales persons. She would spend 3-4 hours each day on this [d]uty.
- Supervise the Purchasing/Warehouse Coordinator
After issuing the sales confirmation order, she would pass them to the warehouse [c]oordinator to prepare merchandise for re-packing, assembling and delivery. She checks the inventory monthly to update stocks status. She supervise[s] and [d]ouble check[s] the shipping status. She would spend 2 hours each day on this duty.
- Responsible on updating credit, receivables, payables and company accounts.
She has the power to make decision in terms of giving credit to the customers. She has the authority to issue and sign checks, withdraw, deposit money for [the] company. She is also responsible for controlling [the] company's expenses. She would spend 30 minutes [o]r one hour each day on this duty.
- Authority to sign contracts.
She has the authority to sign sales confirmation, purchase orders, and other contracts [s]uch as commission terms, sales terms, returns, sales persons contract and etc. She would spend about 15 minutes on this duty.
- Responsible on [sic] Trade Show planning and meetings
She is responsible to apply [for] trade shows, scheduling, planning booth display, [d]esigning booth display decorations, sample coordinations [sic], meetings with sales [p]ersons, buyers,

vendors and other personnel. She would travel to different [s]tates to join trade shows for [sic] at least 6 times a year.

- Strategic Sales Planning and Implementation

She is responsible for the total sales and profitability, forecasting, label program, [c]ustomer service, sample room, showrooms, trade shows and sales meetings. Responsible for approving all pricint [sic] to major accounts. Worked with sales persons, [d]eveloped new products, reviewed product lines presented to buyers, plan-o-grams, P&L analysis for each category, plan warehousing and distribution for products, visit [m]anufacturing facilities and attend/join trade shows.

- Responsible to [sic] recommend personnel

- She has the authority to recommend personnel action such as recruiting, interview[ing], [h]iring, firing and promoting of employees. She is responsible to [sic] supervised and trained employees.

Counsel also submitted Form 941 for the quarters ending December 2002 and March 2003, and Form DE-6 for the same quarters identifying the employment of one worker, the purchasing/warehouse coordinator.

In a decision dated July 1, 2003, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director outlined the beneficiary's above-named job duties and stated "[a]lthough some of the duties and functions may appear to involve managerial tasks, they do not involve management of professionals who actually perform such tasks as sales and accounting." The director noted that rather than supervising employees to perform these duties, the beneficiary would be performing them herself. The director further noted that the independent contractors utilized by the petitioning organization were not under the beneficiary's management, but rather were "answerable to their [own] company's management." The director states "[t]here is no indication that the beneficiary will exercise significant authority over generalized policy or that the beneficiary's duties will be primarily managerial or executive in nature." Consequently, the director denied the petition.

Counsel filed an appeal on August 1, 2003, claiming that CIS based its denial on a "misapplication and misinterpretation of the regulations governing this petition." Counsel states that "[t]he statute was not intended to limit managers and executives to persons who supervise a large number of persons or large enterprise, but allows a beneficiary to be a 'functional manager'." In a brief submitted on appeal, counsel states:

The beneficiary manages an essential function within the company in that she is responsible for all the import activity between the corporation and its clients. She also functions at a senior level within the organizational hierarchy and with respect to the function managed because she is solely responsible for negotiating contracts and establishing policies to further the growth of the company's import business.

[The petitioning organization] is in the import/export business. The import aspect of the business is the essential function that is of vital importance to the success of the corporation. As general manager, [the] Beneficiary is solely responsible for all aspects of the import functions of the corporation. Thus [the] beneficiary manages an essential function within the organization.

Furthermore, according to the letter of employment and her previous duties at the foreign corporation, [the beneficiary] is authorized to hire and fire or recommend personnel actions. She also functions at a senior level because she is second in command to the president of the corporation and is answerable only to her.

Finally, [the] Beneficiary enters into contracts with clients on behalf of the company and implements procedures dealing with the import function on a daily basis. Thus she exercises discretion over the day-to-day operations of the import functions of the company.

Counsel also states that the beneficiary supervises and controls the work of the petitioner's purchasing and warehouse coordinator and the work of four independent contractors, which counsel claims "is sufficient" for the beneficiary to be deemed a manager or executive.

Counsel also claims on appeal that the beneficiary's presence in the United States entity is necessary in order to assure the success of the company's operations. Counsel states that the petitioning organization does not currently require the services of professionals, and states that "the lack of professionals for [the beneficiary] to supervise does not negate the fact that she is functioning as the company's General Manager with all the duties and privileges that title entails."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity 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(l)(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.*

The description of the job duties to be performed by the beneficiary during her employment in the United States clearly identifies many non-qualifying operations of the business for which the beneficiary would be responsible. Specifically, the petitioner's president explained in his May 30, 2003 letter that the beneficiary would be responsible for communicating with customers and vendors, responding to daily correspondence, confirming prices, issuing sales order confirmations, preparing products to be presented to the petitioner's vendors, maintaining the corporation's financial accounts, including performing banking transactions and budgeting expenses, designing trade show booth displays, participating in exhibitions, pricing products, reviewing product lines, and planning the warehousing and distribution of products. Based on the petitioner's account of the beneficiary's responsibilities and the time she would devote to each task, it is evident that the beneficiary would spend the majority of her time performing the functions related to the company's sales, marketing, finances, and distributions, rather than managing employees responsible for the performance of these operations. As properly noted by the director in his decision, while a portion of the beneficiary's job duties includes such managerial tasks as recommending personnel actions and formulating company policies, the record does not demonstrate that the beneficiary would spend the majority of her time performing these high level responsibilities. *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (concluding that the

petitioner must prove that the beneficiary *primarily* performs the high-level responsibilities specified in the definitions of managerial capacity and executive capacity and does not spend a majority of his or her time on day-to-day functions). 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).

Counsel claims on appeal that CIS ignored the concept of functional manager, which counsel states is the capacity in which the beneficiary would be employed. Counsel's claim that the beneficiary would be employed as a functional manager, however, is incorrect. Neither the petitioner nor counsel specifically raised the issue of functional manager until after the director rendered his decision identifying the inadequacies in the record. It is a well-established rule that on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Here, it appears that the petitioner is attempting to conform to the concept of functional manager as an alternative to the director's finding that the beneficiary does not qualify as a manager because he does not supervise managerial or professional employees. On appeal, the AAO will not accept a change in the beneficiary's employment capacity in an attempt to meet the regulatory requirements of L-1A classification.

Alternatively, even if the AAO were to consider counsel's claim of functional manager, the petitioner has failed to demonstrate that the beneficiary would be employed in this capacity. 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.

In the instant matter, neither the petitioner nor counsel has specifically addressed the tasks involved in the import function of the business. Counsel's limited statement on appeal that "[t]he import aspect . . . is of vital importance to the success of the corporation," and that the beneficiary, as general manager, "is solely responsible for all aspects of the import function of the corporation" does not identify the function with specificity or clarify what proportion of the beneficiary's daily job duties are related to the import function. In fact, the petitioner's outline of the beneficiary's job duties in its May 30, 2003 letter does not even address any specific tasks related to the company's import function. Additionally, counsel does not reconcile its claim of function manager with the beneficiary's performance of the above-named non-qualifying sales, marketing, finance, and distribution operations of the business. Moreover, counsel does not account for the performance of the import function by employees other than the beneficiary. The job description of the petitioner's remaining employee, a purchasing/warehouse coordinator, does not identify any tasks related to the business' imports to be performed by the coordinator. Therefore, it is reasonable to assume that the beneficiary herself would be responsible for performing the import function of the petitioning organization. Again, 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. at 604. The petitioner has not provided evidence that the beneficiary would be managing the essential import function of the business.

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. Accordingly, 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.