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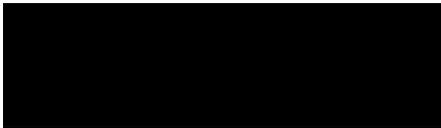
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File: SRC 05 003 52157 Office: TEXAS SERVICE CENTER Date: **AUG 04 2006**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

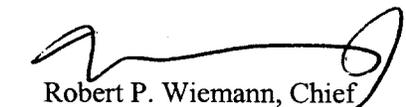
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a United Kingdom corporation, claims to be an affiliate of the U.S. company, a Florida corporation engaged in sign making and property management services. It seeks to transfer the beneficiary to the United States to serve as the sales and marketing manager of the U.S. entity for a three-year period.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Specifically, the director observed that the beneficiary would not supervise a staff of managerial, professional or supervisory personnel.

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 disputes the director's decision, claiming that the beneficiary will manage an essential function of the U.S. entity and is not required to supervise managerial, professional or supervisory personnel. Counsel also asserts that the director understated the number of employees to be supervised by the beneficiary, and placed undue emphasis on the number of employees working for the U.S. entity. Counsel submits a brief and additional evidence in support of the appeal.

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 issue in the present matter is whether the petitioner established that 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), 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.

The nonimmigrant petition was filed on October 1, 2004. In a September 1, 2004 letter, the petitioner noted that the U.S. company “does business in several area’s [sic] including the [s]ign business and [p]roperty management.” The petitioner provided the following description of the beneficiary’s proposed duties:

[The beneficiary’s] responsibilities in the US will be primarily within the [s]ign business. [The beneficiary’s] duties as Sales & Marketing manager of the US company will include overseeing all personal [sic] of the company other than the President & Vice President in charge of all aspects of the Marketing & Sales growth for the company, Working with the customers regarding their explicit requirements, discussing their budgets, specification and ensuring work is completed to customer satisfaction within the set time scale. Working closely with the US staff of the company introducing his knowledge and expertise, [i]mplementing a business plan and Financial budget to allow continuous growth.

On October 15, 2004, the director requested additional evidence, in part instructing the petitioner to submit: (1) a copy of the U.S. company’s organizational chart identifying the beneficiary’s proposed position, the positions he will supervise, and the educational requirements for each position; (2) copies of the U.S. company’s state quarterly tax returns for the 2004 year; and (3) evidence of the current staffing level in the United States including position titles, duties and educational background of all employees.

The petitioner submitted a response dated October 21, 2004. The petitioner’s response included an organizational chart for the U.S. company showing that the beneficiary would report to the managing director and supervise one employee, a designer.<sup>1</sup> The chart shows that the managing director also supervises a president, who in turn supervises a reservations manager. The petitioner submitted the requested Florida Forms UCT-6, Employer’s Quarterly Report, confirming the U.S. company’s employment of four individuals as of September 30, 2004.

The petitioner provided job descriptions for each of the U.S. company’s four employees. With respect to the beneficiary’s proposed subordinate, the graphic designer, the petitioner stated that he is responsible for: taking instructions from customer and designing to their specifications; creating files for vinyl cutting or digital printing; and “weeding Vinyl’s and laying up signage.” The petitioner noted that the president oversees the manufacture of all signage and fitting, consults with customers and discusses their requirements, performs invoicing, purchase of materials, quoting, banking, settlement of accounts, and “all administrative duties” associated with the U.S. company’s sign business, as well as overseeing the petitioner’s property management and rental business. The petitioner indicated that the U.S. company’s secretary is responsible for “all accounting and administration,” reservations, banking, homeowner statements, payroll and tax matters, year end accounting, licensing of homes, and meeting with homeowners. The petitioner stated that the U.S.

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<sup>1</sup> On the attached list of employees, the individual depicted on the organizational chart as the U.S. company’s “managing director” is identified as “president” and the “president” is identified as “secretary.” It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

company “engages no persons of Professional status,” noting that formal education beyond the secondary level is not required in the industry.

The director denied the petition on November 5, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director noted that the beneficiary would supervise only one employee and would not be supervising a subordinate staff of professional, managerial or supervisory personnel.

The petitioner filed the instant appeal on November 30, 2004. On appeal, counsel for the petitioner asserts that the director failed to consider whether the beneficiary would manage an essential function of the U.S. company, noting that the Immigration Act of 1990 “specifically bars the number of persons supervised as the sole basis for denying managerial status to an employee.” Counsel contends that the beneficiary will manage the essential function of the petitioner’s sales and marketing department and is not required to supervise professional, managerial or supervisory employees. Counsel asserts that the AAO should consider the economic importance of the function in relation to the product or service provided by the company, and emphasizes that the U.S. entity’s sales and marketing department “plays a pivotal role in the economical ability of the company to continue to grow.”

In support of the appeal, the petitioner submits a November 22, 2004 letter from its vice president who provides the following additional information:

There are several other employees or subcontractors that [the beneficiary] would supervise. There are several people who work for our company on a regular basis, but do [sic] to their tax situation are considered independent contractors and not employees of the company. . . .

Jason Begley, who is listed as a designer in the original organizational chart that was submitted, has been acting as the manager of the business. The intention was for [the beneficiary] to supervise [REDACTED] when he received his visa and [REDACTED] would devote more of his time to the creative side of the business. Although [REDACTED] does not have a bachelor’s degree from a U.S. school he is very well educated and experienced and acts in as a professional manner with his job duties. . . .

It is our intention to have [the beneficiary] manage a function of the company as the head our [sic] sales and marketing company. . . . This function of our company is a critical part of the business and central to our ability to expand in the U.S. market.

The petitioner also notes that the beneficiary would likely be responsible for undertaking additional responsibilities within the U.S. entity due to the company president’s recent diagnosis with a serious illness. The petitioner submits a revised organizational chart depicting the beneficiary’s proposed position, which indicates that he will supervise Jason Begley, identified as “designer/manager,” who in turn is shown as supervising a bookkeeper and a graphics applicator. The petitioner submits copies of two checks in the amounts of \$426 and \$70 issued by the U.S. company to the individuals identified as the “graphics applicator,” and “bookkeeper,” respectively.

Counsel's assertions are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in the United States 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). 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 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 show 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

In this case, the petitioner's description of the beneficiary's duties suggests that he will be solely responsible for all of the U.S. entity's sales and marketing tasks, rather than primarily managing the sales and marketing function. The petitioner stated that the beneficiary will be "working with the customers regarding their explicit requirements, discussing their budgets, specification[s] and ensuring work is completed to customer satisfaction within the set time scale." These duties suggest that the beneficiary will be primarily engaged in the daily operations of the business, i.e., selling the petitioner's services, and these non-qualifying tasks have not been shown to be merely incidental or secondary to any management duties he may perform. Furthermore, although the petitioner claims that the beneficiary will manage sales and marketing activities, it does not claim to have anyone on its staff to actually perform the non-qualifying tasks associated with these functions, which further supports a conclusion that the beneficiary will perform these duties himself. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The remainder of the petitioner's job description is too vague to establish that the beneficiary would perform primarily managerial duties for the U.S. entity. The beneficiary's other duties include supervising a non-professional graphic designer, "introducing his knowledge and expertise" to the U.S. company's staff, and "implementing a business plan and financial budget to allow continuous growth." The petitioner did not describe the business plan to be implemented, elaborate as to the beneficiary's budgetary responsibilities, or explain how "introducing knowledge" qualifies as a managerial or executive duty. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary will perform the claimed managerial duties. It has been noted that the beneficiary would be the only person performing sales and marketing duties for the petitioner's sign business. Collectively, the evidence brings into question how much of the beneficiary's time can actually be devoted to qualifying managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

On appeal, counsel correctly states that the beneficiary need not supervise personnel in order to qualify as a manager for purposes of this visa classification. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. In response to the director's request for evidence, the petitioner indicated that the petitioner would supervise one employee, a graphic designer, and stated that the U.S. company does not employ any professional staff. On appeal, the petitioner asserts for the first time that the graphic designer performs professional duties; that the graphic designer has served as the manager of the U.S. company's sign business; and, that the graphic designer supervises two subordinate employees who have been employed as independent contractors.

The petitioner's assertions are not persuasive. The petitioner was put on notice of required evidence regarding its staffing and submitted a response indicating that the beneficiary would not supervise managerial, supervisory, or professional employees. 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 Corp.*, 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). The petitioner has not shown that the beneficiary's subordinate employee will be working in a supervisory, professional, or managerial capacity as required by section 101(a)(44)(A)(ii) of the Act.

Counsel's primary argument on appeal is that the beneficiary will manage an essential function of the U.S. company. The term "function manager" applies generally when a beneficiary does not directly 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a detailed job description that clearly describes the duties to be performed in that capacity, i.e., identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, 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). The petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the beneficiary's job description includes non-qualifying duties associated with the petitioner's sales and marketing department, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary or otherwise, who would relieve the beneficiary from performing routine duties inherent to this function. The fact that the beneficiary has been given a managerial job title and will be the only employee performing any duties associated with the petitioner's sales and marketing is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations. The petitioner has not shown that the beneficiary will perform primarily managerial duties, nor has it been established that he would function at a senior level within an organizational hierarchy. Accordingly, the petitioner has not established that the beneficiary will be employed primarily as a manager of an essential function.

Counsel correctly observes that 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* § 101(a)(44)(C) of the Act, 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).

At the time of filing, the petitioner was a three-year-old company operating two service-oriented businesses, a property management and rental business and a sign making business, with only four employees. Although three of the petitioner's current employees have managerial job titles, the job descriptions provided by the petitioner indicate that all of the current employees of the company, including two employees who would be senior to the beneficiary's position, are directly engaged in performing the day-to-day operations of the company. For example, the petitioner's highest level employee, the president, is described as being responsible for administrative duties, banking, invoicing, purchasing materials, and customer service duties. There is no evidence to suggest that the company, in light of its current stage of development, has a reasonable need for a sales and marketing manager who would perform primarily managerial duties.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

For the foregoing reasons, the petitioner has not established that the beneficiary will be employed by the United States entity in a 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.

**ORDER:** The appeal is dismissed.