

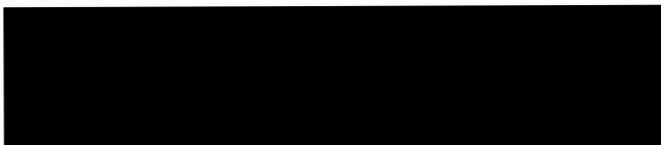
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U.S. Citizenship
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FILE: WAC 03 058 55176 Office: CALIFORNIA SERVICE CENTER Date: **AUG 30 2006**

IN RE: Petitioner:
Beneficiary:



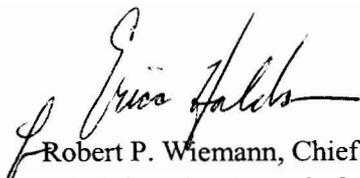
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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 under the laws of the State of California and is engaged in the transportation and delivery service business. The petitioner claims that it is the subsidiary of French Key Compania Naviera, Ltd., located in Lebanon.

The director determined that the petitioner failed to establish that the beneficiary had been or would be employed by the United States entity primarily in an executive capacity.

On appeal, counsel for the petitioner disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties have been and will be executive in nature. Counsel submits a brief and evidence in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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 regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily 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.

The nonimmigrant petition was filed on December 12, 2002. In a letter of support dated December 9, 2002, the petitioner noted that the petitioner has four employees in addition to the beneficiary and described the beneficiary’s job duties as president as follows:

[The beneficiary] will continue in his executive capacity, and will be responsible for all executive level decisions of the business and will accordingly attend to the establishment of the business, its direction, guidance, coordination and development. He will continue to be responsible for our policies, strategies and philosophy for implementation by managerial and supervisory employees. More specifically [the beneficiary] will ensure that his executive decisions/policies/philosophy are implemented by the managers and workers in the business. He will furthermore be the individual responsible for establishing guidelines and direction for the promotion/development of our business.

* * *

The beneficiary's executive functions will continue and will more specifically encompass the following:

- Will hire and fire workers. Will furthermore be functioning at a senior level
- Will exercise discretion over the day-to-day operations of the business activity
- Rendering all executive level decisions of the business, being the businesses direction, guidance, coordination and development
- Rendering policies, strategies and philosophy for implementation by managerial and supervisory employees.
- Control and manage the overall operation of the business and the employees therein

The petitioner attached an organizational chart for the U.S. company which depicted the beneficiary as president, directly supervising an employee, [REDACTED], who is identified in the positions of vice president/marketing and operations manager. Four "workers" are depicted as subordinate to the operations manager position. The petitioner also submitted its payroll records for the 2001 and 2002 years. The most recent payroll statement, dated October 28, 2002, confirmed wages paid to the beneficiary and to the four "workers."

The director determined that the petitioner had submitted insufficient evidence to establish the beneficiary's managerial or executive role, and thereafter requested that the petitioner submit the United States company's organizational chart including the names, job titles and brief description of job duties for all employees under the beneficiary's supervision. The director also requested the following:

- DUTIES IN THE U.S.: Submit a more **detailed** description of the beneficiary's duties in the U.S. **Be specific. Indicate exactly who the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction.** Also, indicate all duties participated in by the beneficiary, and the percentage of time spent in each of the beneficiary's listed duties. Indicate who handles the day-to-day operations of the company, including the assembly and processing of the materials and products of the company.

In response to the director's request for additional evidence the petitioner submitted the following descriptions as the beneficiary's executive duties:

As President of the petitioner the beneficiary will have (and as he currently does have an L-1A capacity) the full authority over the day-to-day management and policy making decision. 35%

In his capacity as President the beneficiary currently bears and will continue to bear responsibility for the management of the petitioner's business. This responsibility includes, but is not limited to, devising corporate policy, strategy and philosophy as well as overseeing the entire business. 25%

The beneficiary has the sole right and duty to hire/fire employees including all managers/supervisors as well as compensation and promotion issues.

The beneficiary will make all decisions in the area of contract finalization

The beneficiary will make all decisions as regards the development and increase of the business activities and have such decisions implement by subordinates

The beneficiary's position as President (Chief Executive) will involve the understanding and application of methods in the various areas of the business such as management, marketing, operational research, inventory management, personnel management and the myriad of other components that together constitute the function of the head of a business. The areas mentioned are those that will enable the beneficiary to exercise his sole and total discretionary powers in making all his corporate decisions. 40%

The functions/duties of the beneficiary clearly give him complete discretion in making all executive level decisions.

The petitioner also submitted a new organizational chart of the U.S. entity that depicts the beneficiary as president, directing the vice president of marketing and an operations manager (again, it appears that both positions are filled by the same individual), and a secretary/bookkeeper. It also depicts four positions described as commissioned drivers, all under the direction of the president and operations manager. The petitioner noted that the secretary/bookkeeper and vice president have bachelor's degrees. The petitioner did not provide a brief description of the duties performed by the beneficiary's subordinates.

The director denied the petition on February 10, 2003, determining that the petitioner had not submitted sufficient evidence to establish that the beneficiary will be employed primarily in a managerial or executive capacity. The director went on to state that in light of the organization's configuration, it was apparent that the beneficiary would be functioning in both managerial duties and day-to-day non-managerial duties.

On appeal, counsel asserts that the director's decision was in error and that the evidence submitted by the petitioner supports a finding that the beneficiary will be employed in an executive capacity. Counsel cites to unpublished decisions in support of the petition. Counsel asserts that the beneficiary qualifies as an executive in that the job duties to be performed by the beneficiary practically mirror the INA requirements. Counsel also contends that the beneficiary's executive job duties are identical to that of the previous petition that was granted by Citizenship and Immigration Services (CIS), and therefore, the beneficiary qualifies as an

executive in the instant matter. Counsel contends that the "commissioned" drivers are currently employed directly by the petitioner. Counsel submits a payroll statement, dated March 27, 2003, prepared by the American Employers Group for the U.S. entity, along with the company's 2002 W-2, as evidence on appeal. Counsel further states that the beneficiary will continue to serve as the decision-maker of the U.S. entity and will continue to control the business and render all executive functions of the operation. Specifically, listing, counsel states that the beneficiary will:

- Direct the management of the organization;
- Establish goals and policies of the organization;
- Devise corporate policy, strategy and philosophy as well as oversee the entire business;
- Has the sole right to hire and/or fire employees including all managers/supervisors;
- Will make all decision [sic] in the area of contract finalization; [and]
- Establish guidelines for the promotion/development of the organization.

Counsel's assertions are not persuasive. Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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)(iii).

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).

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary will: "direct the management of the organization, "establish goals and policies of the organization," and "devise corporate policy, strategy and philosophy as well as oversee the entire business." In addition, the job description of the beneficiary included non-managerial duties such as: "understanding and application of methods in the various areas of the business such as management, marketing, operational research, inventory management, personnel management and the myriad of other components that together constitute the function of the head of a business." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the marketing, operational, inventory, and personnel functions that the beneficiary will supervise.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). The petitioner's

descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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 at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

A critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary's position will "involve the understanding and application of methods in the various areas of the business such as management, marketing, operational research, inventory management, personnel management..." If the beneficiary has supervisory control over such functions, it is unclear who will for example actually develop and implement the marketing and promotion programs and who will handle the day-to-day personnel issues, and inventory operations. The record does not provide evidence that the petitioner or its subsidiaries have a marketing manager, human resources manager and accounting manager that the beneficiary will oversee. Therefore, although the petitioner claims the beneficiary is in charge of these functions, it must be evident from the record that the beneficiary actually performs many of the tasks that he has been assigned to oversee. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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 § 101(a)(44)(A)(ii) of the Act. The petitioner indicates that the company's vice president and its bookkeeper/secretary have completed bachelor's degrees.

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 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. Although requested by the director, the petitioner failed to provide a job description for the beneficiary's claimed subordinates and therefore the AAO cannot evaluate whether these positions required a bachelor's degree. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant case, the

petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the secretarial and administrative work of the secretary/bookkeeper and the operations manager, who is among the beneficiary's subordinates.

While the petitioner's organizational chart depicts a "vice president/marketing" and an "operations manager" under the beneficiary's position, both of these job titles have been assigned to the same individual. Furthermore, the petitioner has not provided documentary evidence that it actually employed this individual, Mahmoud Maraach, at the time of filing the petition. This employee did not receive a Form W-2 from the petitioner in 2002, although he does appear on the petitioner's March 2003 payroll records. In addition, the AAO notes that the secretary/bookkeeper did not appear on the beneficiary's initial organizational chart and does not appear to have been employed when the petition was filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not established that the beneficiary supervised a staff of supervisory, professional or managerial employees. The petitioner has not submitted evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than that of a first-line supervisor of four non-professional drivers. 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).

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In addition, while company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business which, together, can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role.

At the time of filing in 2002, the petitioner had been established since 1999 and claimed to have employed the beneficiary as president and one other employee as vice-president and operations manager. The petitioner also claimed that four other workers who were described as commission drivers were also employed by the U.S. entity. The petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company other than the actual delivery services. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

While the petitioner's lower level employees may perform the day-to-day duties associated with delivery services, job duties performed in connection with the business' sales, marketing, purchasing, finances, inventory management, driver scheduling, advertising and general administration may also be deemed non-qualifying if the beneficiary is personally performing these tasks, rather than supervising the performance of these routine duties by other subordinate employees. As discussed further below, the record does not establish that the petitioner employed lower-level staff to perform these operational tasks.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

On appeal, the petitioner noted that CIS approved the petition that had been previously filed on behalf of the beneficiary. The AAO noted that in making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Based on the lack of evidence of eligibility in the instant record, the director was justified in departing from the prior nonimmigrant petition approval.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Beyond the decision of the director, the petitioner's description of the stock distribution of the companies does not meet exactly the definitions constituting a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The petitioner submitted a stock certificate, number one, indicating that French Key Compania Navier Ltd, Lebanon is the holder of 250 shares of the U.S. company. However, the petitioner did not present any documentation to support that this stock certificate was the only one issued for the U.S. company. According to the articles of incorporation, the U.S. company is allowed to issue up to 10,000 shares of common stock. Thus, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition cannot 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 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).

The petitioner will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.