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U.S. Citizenship  
and Immigration  
Services

D7

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File: EAC 05 800 18965 Office: VERMONT SERVICE CENTER Date: DEC 05 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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 visa petition seeking to employ the beneficiary for a period of three years as its general manager 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 New York and is allegedly engaged in the diamond trade. The petitioner claims a qualifying relationship with [REDACTED] Ltd. of Israel.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States, or has been employed abroad, in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary will be, and has been, employed primarily as an executive or manager.

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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (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 petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act or primarily executive duties under section 101(a)(44)(B) of the Act, and implies that the beneficiary will be acting as both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Given the ambiguity, the AAO will consider the appeal as

if the petitioner is asserting that the beneficiary will be employed primarily as either an executive *or* a manager.

The petitioner described the beneficiary's proposed duties in a letter dated April 1, 2005 appended to the initial petitioner as follows:

Direct, formulate, and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers.

Direct the gathering of information as to competitors['] diamond trade and pricing.

Direct the sales and review regularly financial reports to ensure that sales persons (both employees and sub contractors) perform as required.

Oversee the logistics of importing, custom clearing, shipping, handling returns, and handling security to ensure that the inventory is not being tampered with.

Meet from [time] to time with accountant, bank representatives, the company's owners.

Initiate financial statements and review them on a regular basis.

Direct clerical staff to keep records of export correspondence, bid requests, and credit collections, and to maintain current information on tariffs, licenses, and restrictions[.]

Direct the hiring, training, and performance evaluations of marketing and sales staff and oversee their daily activities.

Hires staff and ensures that the staff is trained appropriately and that the customers['] satisfaction is on a high standard.

Direct the sales department to compile sales forecasting and strategic planning in order to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends.

In his performance as general manager, [the beneficiary] will have independent discretion to make decisions.

The petitioner also provided an organizational chart for the United States operations showing the general manager at the top of the organization supervising two employees, including a sales manager who, in turn, is shown supervising three salespersons. However, the wage reports provided by the petitioner for the quarter immediately preceding the filing of the petition fail to identify any of the salespersons and indicate that the petitioner employed three people during that quarter, the sales manager, the administrator, and a third employee not identified on the organizational chart.

On April 13, 2005, the director requested additional evidence. The director requested, *inter alia*, details regarding the beneficiary's job duties, a description of the subordinate employees' duties, and an explanation as to how much discretionary authority the beneficiary will have over day-to-day operations.

In response, the petitioner asserts in a letter dated May 4, 2005 that the beneficiary is an "executive/general manager, or a functional manager, based on his job duties and qualifications." The petitioner also provided a breakdown of the beneficiary's duties in which the petitioner claims that the beneficiary will spend over 75% of his time working with the sales manager on issues such as pricing, transactions, and customer needs; directing clerical staff, conducting staff meetings; directing administration and logistics personnel; and meeting with the accountant, bankers, the bookkeeper, and the owners. The rest of the time is dedicated to training, hiring, setting goals, marketing, and reviewing financial reports.

Finally, the petitioner asserts that the beneficiary will have independent discretion to make decisions and provides the following job description for the sales manager:

[The sales manager d]irects the sales force (employees and contractors); Meets with sales persons and discuss sales strategies; Meets with store owners and arranges attractive display of the company's merchandise; Hires sales representatives in other regions of the country; ensures that the company distributes merchandise in a timely fashion; Guides the staff in storing and shipping of merchandise. Negotiates with customers, prices, terms of payment and shipping, custom issues; Searches for new employees, hires and fires employees; Sets working procedures and trains employees. Supports the logistics whether the activities were done by company's personnel or outside contractors; shipping companies, custom agents, insurance.

On May 20, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary will be employed primarily as an executive or manager. Specifically, counsel to the petitioner asserts that the beneficiary will manage an essential function of the organization, i.e., the importation and sale of diamonds, or will be an executive.

Upon review, the petitioner's assertions are not persuasive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include directing marketing and establishing goals. The petitioner did not, however, specifically define what marketing activities are being pursued or what goals are being established. Moreover, while the petitioner asserts that many of the beneficiary's duties will require the services of subordinates such as administrative and logistical personnel, a clerical staff, a bookkeeper, an accountant, and advertising experts, the petitioner fails to provide any information regarding the identity, or even the existence, of such employees or subcontractors. As the record indicates that the petitioner employs three people, it appears that the petitioner does not employ the support personnel necessary to perform the non-managerial or non-executive tasks necessary to perform the duties identified as the responsibility of the beneficiary. Duties such as website design, marketing, gathering information on competitors, bookkeeping, and diamond importing are not managerial in nature. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

The petitioner also failed to establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or that he will manage an essential function within the organization. While the petitioner did supply an organizational chart, the job description provided for the subordinate "sales manager" reveals that this employee performs the tasks necessary to produce a product or to provide a service. The job description for the sales manager fails to establish that this employee has any supervisory or managerial duties. Not only does the job description list many non-qualifying operational or administrative tasks (i.e., negotiate with customers, sets working procedures, logistical support), the petitioner fails to provide a breakdown of how much time is spent by this employee performing such non-qualifying tasks. Finally, since the record is devoid of any evidence that the petitioner employs or otherwise compensates salespersons, it has not been established that the sales manager has any managerial responsibilities over subordinates. In view of the above, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the job descriptions provided for the subordinate employees do not establish that they are professionals.<sup>1</sup> Therefore, the record does not prove that the beneficiary will be acting in a managerial capacity.

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<sup>1</sup>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

Also, the petitioner has not established that the beneficiary will manage an essential function of the organization. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description, which includes operational and administrative tasks and indicates that he will likely have first-line supervisor responsibilities, fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

Similarly, the petitioner has failed to prove that the beneficiary will act in an "executive" capacity. 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. 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 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-day 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.* As indicated above, the petitioner has failed to prove that the beneficiary, who is allegedly managing employees who are apparently engaged in providing services to customers and who is primarily engaged in performing administrative or operational tasks, will be acting primarily in an executive capacity.<sup>2</sup>

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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).

<sup>2</sup>It should be noted that, on appeal, counsel to the petitioner provided a letter dated July 12, 2005 purporting to vest the beneficiary with substantial authority to direct the management of the United States operation. In

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).

The second issue in the present matter is whether the beneficiary has been employed by the overseas entity in a primarily managerial or executive capacity.

The overseas employer described the beneficiary's proposed duties in a letter dated April 1, 2005 appended to the initial petitioner as follows:

Coordinate sales distribution by establishing sales territories, quotas and goals;

Monitor customer preferences to determine focus of sale efforts;

Confer or consult with department heads to plan advertising services and to secure information on merchandise and customer specifications;

Allocate areas to sales persons;

Represent company at trade association meetings to promote products;

Plan and direct staffing, training, and performance evaluations to develop and control sales and service programs;

Review operational records and reports to project sales and determine profitability;

Determine price schedules and discount rates;

Maintain detailed knowledge of the company's products;

Resolve customer complaints regarding sales and service.

The petitioner also provided an organizational chart for the foreign employer indicating that the beneficiary oversees an assistant sales manager who, in turn, oversees three salespersons.

On May 20, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

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view of the Request for Evidence, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In any event, such self-serving evidence would not establish that the beneficiary will be primarily employed as an executive.

On appeal, counsel to the petitioner does not directly discuss the director's determination that the petitioner has not established that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition on this basis.

As explained above, 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 has failed to establish that the beneficiary has been acting in a "managerial" capacity for the foreign employer. In support of its petition, the petitioner has 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. Moreover, many of the tasks listed are non-qualifying administrative or operational tasks and are not managerial or executive duties. For example, establishing sales territories, monitoring customer preferences, attending trade association meetings, setting prices, and resolving customer complaints are not qualifying managerial duties. Absent a credible breakdown establishing how much time the beneficiary spends performing these non-qualifying duties, the AAO cannot determine whether the beneficiary is primarily employed in a managerial capacity. 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. at 604. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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.*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41.

The petitioner also failed to establish that the beneficiary has been supervising and controlling the work of other supervisory, professional, or managerial employees, or that he has been managing an essential function within the organization. While the petitioner did supply an organizational chart, the petitioner did not provide a job description for the subordinate employee purported to have managerial or supervisory duties. Therefore, the petitioner has not established that the assistant sales manager is truly a supervisory or managerial employee. Absent this crucial evidence, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the job descriptions provided for the subordinate employees do not establish that they are professionals. Therefore, the record does not prove that the beneficiary has been acting in a managerial capacity.<sup>3</sup>

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<sup>3</sup>While the petitioner has not specifically alleged that the beneficiary manages an essential function overseas, the record would not support this assertion. The petitioner's vague job description, which includes

Similarly, the petitioner has failed to prove that the beneficiary has been acting in an "executive" capacity. As indicated above, the petitioner has failed to prove that the beneficiary, who is allegedly managing employees who are apparently engaged in providing services to customers and who is primarily engaged in performing administrative or operational tasks, has been acting primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(iv).

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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operational and administrative tasks and indicates that he will likely have first-line supervisor responsibilities, fails to document what proportion of the beneficiary's duties are managerial functions and what proportion are non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties are managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc.*, 48 F. Supp. 2d at 24.