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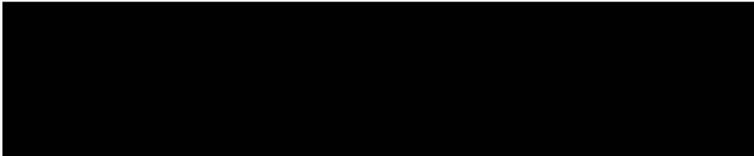
FILE: WAC 04 218 50919 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



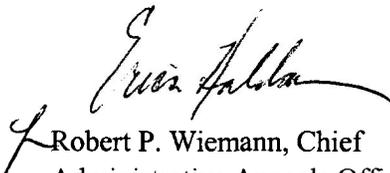
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner, a California corporation, claims to be engaged in the production of computer-aided solutions for industry. The petitioner states that it is a wholly-owned subsidiary of [REDACTED] located in Germany. Accordingly, the United States entity petitioned U.S. Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a one-year extension. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The director also noted that the petitioner failed to fully respond to the request for evidence, and that the petitioner did not provide any evidence of additional employees employed by the U.S company.

On appeal, counsel for the petitioner states the following on the Form I-290B, Notice of Appeal:

The service erred in finding that the position of president of petitioner was not executive or managerial because:

1. It failed to take into account the reasonable needs of petitioner in light of its overall purpose and stage of development.
2. It erred in not finding the positions of the subordinate employees to be "professional".
3. It failed to understand that beneficiary was acting as a "functional manager"

Counsel submits a brief 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 regulation at 8 C.F.R. § 214.2(l)(3) further 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 matter is whether the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.

In addition, 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 August 2, 2004. The Form I-129 indicates that the beneficiary will continue to be employed in the position of President. The beneficiary's proposed duties in the United States are described as "general director of operations," and "establishment and exp[an]sion of sales-/Marketing [sic] systems customer service base for U.S. market." The petitioner stated that it had two employees as of the date of filing. The petitioner did not submit supporting documentation with the petition.

On March 4, 2005, the director requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested: (1) an organizational chart for the U.S. entity, including names and job titles for all employees, job duties, educational level, annual salaries and immigration status; (2) a more detailed description of the beneficiary's job duties, indicating who the beneficiary supervises and percentage of time spent in each of the listed duties; and (3) copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Employer Quarterly Wage Reports for all employees for the last four quarters.

The petitioner submitted a response on May 27, 2005. In its response, the petitioner submitted a document describing the beneficiary's role as president of the company to include the following:

- Manages customer and technical services Customers who purchased a larger number of software licenses.
- Manages new products, projects in software and industry automation, such as solutions for Messaging systems, solution for water treatment industry.
- Manages marketing activities and contacts to manufacturers for strategic partnerships with a number of software companies to incorporate our product as a part of broader software solutions.

In addition, the petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as president who in turn supervises one employee in production, customer and technical services, one employee in customer service marketing, and one vice president. The petitioner failed to submit a more detailed description of each employee's job duties or evidence of wages paid to employees as requested by the director.

In addition, the petitioner submitted a letter from the foreign entity dated March 24, 2005, describing the services the U.S. entity will continue to provide to the petitioner's clients as the following:

- The customers expect a telephone hotline for sales issues and technical support throughout the usual business hours. This is absolutely critically [sic] for customer satisfaction and a pre-condition for establishing a customer base. We cannot provide these services from Germany, mainly because of the time difference. We cannot afford a call center that is available throughout US business hours, because that would mean night work for German call center employees. We cannot outsource call center service to some external service provider either, due to the lack of control we would have. Therefore, it is important that you as [the U.S. company] handle all customer inquiries. In case that you have to employ additional personnel, it is critically that you assess all job applicants personally.

The same is true for support by means of electronic mail. Although the customer does usually not expect an immediate response, there is in fact at least a delay of one day, due to the time difference between the US west coast and Germany. It is necessary that you monitor customer inquiries by email throughout the usual business hours and respond the same day whenever possible.

- The customers expect us to be a vendor who is familiar with US business conventions. A lot of customers required us to use special forms for purchase orders or vendor registration. Clarifying and understanding such requirements from a location in Germany often means a delay of one to two days. This delay is not acceptable for our customers who often need immediate answer.
- Customers who purchased a larger number of software licenses may require 24/7 support by service technician. Although this kind of service is not provided yet, some customers have stated interest in such a kind of services. In case that customers order such service, you as [the U.S. company] have to be present at the customer's site for the first time and you will have to establish a network of service technicians, if required.
- Some customers expect integrated solutions, that is, solutions that integrate hardware and software. It is only possible to provide such integrated solutions if you are able to cooperate with hardware vendors and dealers in the US.
- We are consistently looking for strategical partnerships with a number of software companies to incorporate our product as a part of broader software solutions. Such partnerships can certainly be established only through personal contact. It is necessary that you as [the U.S. company] arrange, establish and maintain these contacts.

In addition, the petitioner submitted its California, Forms DE-6, Quarterly Wage and Withholding Report, for the period from January 2004 through March 2005, which indicated that the United States company had one employee, the beneficiary, throughout this period.

The director denied the petition on August 2, 2005 on the ground that the petitioner provided insufficient evidence to establish that the beneficiary will be in a position that is primarily managerial or executive in nature. The director stated that although the organizational chart for the U.S. entity indicated four employees, the state quarterly wage report for 2004 indicated that the U.S. company had only hired one employee, the

beneficiary. In addition, the director stated that the petitioner did not submit a more detailed job description for the beneficiary's proposed position as requested by the director. The director further stated that the proposed position is primarily comprised of marketing tasks and thus it appeared that the beneficiary will be providing a service or producing a product rather than directing subordinates who would relieve the beneficiary from performing non-qualifying duties. Finally, the director stated that the beneficiary's subordinates do not appear to be professionals or managers.

On appeal, counsel for the petitioner asserts that the beneficiary will hold a position of managerial and executive capacity. Counsel states that the petitioner submitted a letter describing the beneficiary's duties and "the nature and scope of the duties described in this letter, the status and activities of his subordinate staff and his responsibilities and obligations clearly demonstrate that substantially all of his activities are at the managerial or executive level." In addition, counsel argues that executives of large companies often promote their products, make personal calls or personal appearances, and participate in negotiations.

Counsel for the petitioner further asserts on appeal:

Petitioner was a little over one year old when it submitted the present petition. In order to progress from inception to that of the functioning and viable company, is clear that it, like any startup company, needed strong leadership.... Clearly then, it is essential to have an executive capable and assigned with the duties and responsibilities consistent with the ability to make the changes in objectives, goals and styles necessary to maintain growth and stability. Therefore, it is 'reasonable' to assume that petitioner a president or executive to run their business at this critical 'stage of development.'

Finally, counsel for the petitioner asserts that the beneficiary will supervise professional employees who have bachelor's degree, and he will manage an essential function of the United States company.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a 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 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).

The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such as the beneficiary "manages customer and technical services Customers who purchased a larger number of software licenses," "manages new products, projects in software and industry automation, such as solutions for Messaging systems, solution for water treatment industry," and "manages marketing activities and contacts to manufacturers for strategical partnerships with a number of software companies to incorporate our

product as a part of broader software solutions.” 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.

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties and the percentage of time the beneficiary would allocate to each duty. The petitioner did not submit the requested job description as requested by the director. 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). 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 now seeks to clarify the beneficiary's duties 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). The appeal will be adjudicated based on the record of proceeding before the director.

Furthermore, based on the U.S. company's California Forms DE-6, Quarterly Wage and Withholding Report for the four quarters in 2004 and the first quarter of 2005, it appears that the beneficiary is the only individual employed by the U.S. company. Since there are currently no other employees at the company, it appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. Thus, the U.S. company has not hired employees to perform the marketing, promotion, customer service, technical support, negotiation and financial development activities of the company. According to the record, it is evident that the beneficiary will perform primarily non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

Moreover, the organizational chart is inconsistent with other information in the petition. The chart indicates that the beneficiary directs three employees: the vice president, one employee in production, customer and technical services, and one employee in customer service marketing, however, as noted above, the California Form DE-6, Employer Quarterly Wage Report, for 2004 and the first quarter of 2005, indicate that the only individual employed by the U.S. company is the beneficiary. 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).

Although counsel states on appeal that the petitioner has three additional subordinate employees as listed on the U.S. organizational chart, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has

not explained how the services of the three employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its 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)).

As the United States company has only employed the beneficiary, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is performing all sales, customer service and marketing functions and financial development, and all of the various operational tasks inherent in operating the company on a daily basis, such as participating in negotiations, contacting new clients, and responding to customer service inquiries. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Since the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity, the appeal will be dismissed.

Furthermore, on appeal, counsel for the petitioner asserts that the beneficiary manages "professional" employees. As noted above, the petitioner has not submitted evidence that the subordinate employees are in fact employed by the United States company. 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. Absent evidence that the petitioner actually employed the claimed subordinates as of the date the petitioner was filed, the AAO need not consider whether the beneficiary's claimed subordinates are professionals. However, the AAO does concur with counsel that the director had no legitimate basis for concluding that "it is apparent that these types of positions are not ones that would normally require a college graduate," particularly in light of the fact that the petitioner did not submit job descriptions for the beneficiary's claimed subordinates. The director's comment is withdrawn.

The petitioner's minimal evidence regarding its proposed business, the lack of job descriptions provided for the beneficiary and his proposed subordinates, and the lack of evidence to establish that the subordinates are in fact employed by the U.S. company, collectively, fail to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary will act as a function manager for the U.S. company. 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing 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 manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this

matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's unsupported assertion that the beneficiary manages all the essential functions of the corporation is insufficient to meet the petitioner's burden of proof. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meanings of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738.5739 (Feb. 27, 1987). The record must establish that the majority of the beneficiary's actual duties are managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. v. Sava*, 724 F. Supp. at 1108.

As discussed above, the beneficiary's job description appears to include non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not sufficiently identified a subordinate staff who would relieve the beneficiary from performing routine duties inherent to operating the company on a day-to-day basis. The fact that the beneficiary has been given a managerial job title is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations.

Finally, on appeal, counsel for the petitioner asserts that the "service failed to take into account the reasonable needs of petitioner in light of its overall purpose and stage of development." 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. 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.

At the time of filing, the petitioner was a two-year-old company that claimed to have two employees and a gross annual income of \$80,000 to \$100,000. According to the Form DE-6, Employer Quarterly Wage Report for 2004 and the first quarter of 2005, the company only employed the beneficiary. The AAO notes that the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. The petitioner reasonably requires employees to market and promote its products, respond to telephone and electronic mail inquiries from customers, regarding sales and technical issues, maintain relationships with vendors, and handle the company's day-to-day financial and administrative tasks. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president. 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.

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.

Again, 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.

On appeal, counsel refers to several unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based upon evidence submitted, it is evident that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president and general manager. 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 petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

The petition will be denied and the appeal dismissed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.