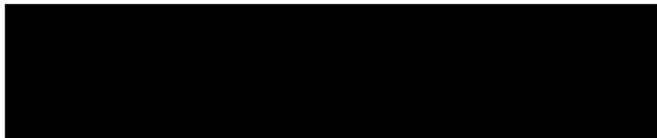


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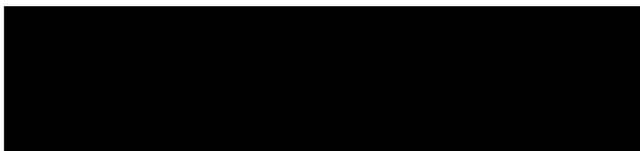
FILE: WAC 04 047 52791 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2006

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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The 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, a California corporation, claims to be the subsidiary of [REDACTED], located in Guangdong, China. The petitioner is engaged in international trade, specifically engaging in the import and distribution of automotive lamps, fuses, and related items. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. In addition, the director concluded that the evidence did not establish that the petitioner had been doing business as provided by the regulations.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director abused his discretionary authority in denying the petition. In the brief accompanying the appeal, counsel expanded by providing further clarification as to why the petitioner was qualified for the benefit sought.

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)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to

employees when the beneficiary will be employed in a management or executive capacity; and

- (e) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the beneficiary has been and will continue to 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.

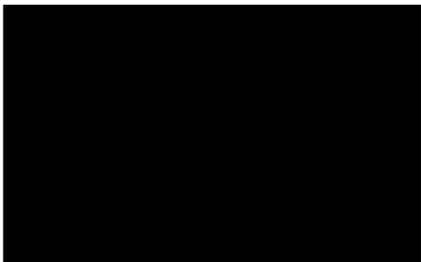
Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (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.

In the initial petition, both the petitioner and the petitioner's counsel submitted letters of support, dated December 4, 2003 and December 5, 2003, respectively, which provided identical descriptions of the beneficiary's duties. His duties were described as follows:

1. He determines and formulates [the] company's policies and establishes business goals. With the business nature in mind, he considers the company's marketing capability, financial capability and matters of human resources. He also considers competitors' advantages and disadvantages of marketing and financial capabilities and human resources. Also, he considers the social and economic environment here in the United States. Based upon all these, he determines and formulates the company's policies: product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy. And he sets forth the company's business goals.
2. He assigns authorities and responsibilities to the subordinate management. They will establish their own objectives, working procedures and evaluation systems. He reviews marketing and financial reports to ensure that the company's objectives are achieved. He also analyzes operations to evaluate [the] company's performance and to determine areas of cost reduction and program improvement. He also directs financial and budget activities to fund operations and increase efficiency. He demands periodical [sic] reports from the subordinate management.
3. He exercises his discretionary authority in decision-making. If the marketing environment greatly changes, he decides on changing the company's business nature or adjusts the business goals. He also decides on the adjustment of product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
4. He reports to the parent company in China about the performance of the US subsidiary company and business opportunities here in the United States. Also, he receives information and instructions from the parent company in China.

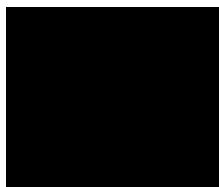
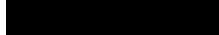
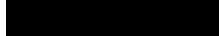
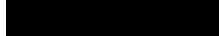
Additionally, the petitioner provided copies of its quarterly tax returns for the quarters ending June 30, 2003 and September 30, 2003. The most recent return showed that the petitioner employed four employees in addition to the beneficiary, namely, [REDACTED], and [REDACTED]. An organizational chart submitted for the U.S. entity indicated that these employees occupied the following positions within the petitioner's organizational hierarchy:



- President
- Secretary
- Information Technology Specialist
- Sales Manager
- Sales

On April 28, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business.¹ The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties, including the percentage of time spent on each duty. The director also asked the petitioner to identify all subordinates of the beneficiary, with a description of each person's position title and their duties. Finally, payrolls records were requested to corroborate the petitioner's employment of these persons.

In a response dated July 16, 2004, the petitioner, through counsel, responded to the director's request. Counsel restated the previously-provided description of duties for the petitioner (numbered 1 through 4, above) and advised that, with regard to the percentage of time that the beneficiary devoted to his duties, "[t]he beneficiary spends 20% of his work time on duty 1; 35% on duty 2; 35% on duty 3; and 10% on duty 4." In addition, with regard to the beneficiary's subordinate employees, the following brief descriptions of their duties were provided:

 Information Technology Specialist:	Responsible for e-commerce
 Secretary:	Responsible for office affairs
 , Sales Manager:	Direct and supervise sales activities
 y, Sales:	Sells company's products

On August 18, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would be managing professional, supervisory, or managerial employees. Instead, the director concluded that the record indicated that the beneficiary would be performing the day-to-day duties of the company, and that he would be acting merely as a first line supervisor.

On appeal, counsel for the petitioner asserts that the beneficiary is in fact functioning in a primarily managerial or executive capacity by virtue of his position at the top of the petitioner's organizational hierarchy. Counsel further restates the description of duties previously provided with the petition and in response to the request for evidence, and provides for the first time an hourly breakdown of the beneficiary's duties on a typical workday. Citing unpublished decisions, counsel then concludes that the beneficiary is clearly qualified for the extension of the 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)(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.*

¹ Please note that the director also issued a prior request for evidence on February 12, 2004, which specifically dealt with the business plan of the petitioner's organization. Since that request and the response thereto are not pertinent to the current issue, they will not be discussed here.

The description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including quarterly tax returns and a more specific description of the beneficiary's duties. The petitioner responded to this request, but merely restated the nonspecific description previously deemed unacceptable by the director. The director, therefore, found the petitioner's response insufficient to establish that the beneficiary's duties qualified under the requested classification.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. 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). Although the petitioner provided a broad statement of the beneficiary's duties in the initial petition and again in response to the request for evidence, this description did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's managerial/executive duties, and failed to discuss or identify job-specific tasks or obligations the beneficiary was required to perform.

In this matter, the petitioner basically equates managerial and executive capacity with the beneficiary's title of president, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Although counsel on appeal does provide a detailed overview of an average workday for the beneficiary, with a breakdown of his duties and tasks in an hourly format, this new evidence is unacceptable on appeal. Since the director clearly requested a more specific description of the beneficiary's duties in the request for evidence dated April 28, 2004, 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 a more specific description of the beneficiary's duties and opted to resubmit the previously submitted description, which the director had already deemed insufficient. The fact that the petitioner, through counsel, now submits a more detailed breakdown of the beneficiary's typical workday on appeal does not afford the petitioner a second chance to prove the beneficiary's qualifications. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. 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.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B)

of the Act. Here, as noted above, the petitioner provides virtually no detail or discussion of the beneficiary's actual duties prior to adjudication. Instead, the petitioner appears to rely on the beneficiary's title and his position at the top of the petitioner's organizational hierarchy as a means for concluding that the beneficiary is qualified for the benefit sought. As previously stated, 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. at 1103. Furthermore, without specific documentation to support the petitioner's contentions, the assertions that the beneficiary is a president and thus is acting primarily as a manager or executive are not acceptable. 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).

Furthermore, although the petitioner has submitted payroll records and quarterly tax returns which indicate that the petitioner did in fact employ five employees, including the beneficiary, at the time of filing, the petitioner failed to show that the beneficiary oversees a staff of professional, supervisory, or managerial employees. 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 organizational chart and the relative positions of the named employees is not persuasive in establishing the beneficiary's managerial and executive duties, because aside from the employee names, titles, and an extremely brief description of their designated duties, it does not indicate with any level of certainty the exact nature of the positions these employees fill. For example, the response to the request for evidence and organizational chart do not establish who handles the administrative functions at the company or who answers the phones and keeps the books; although the secretary's duties are described as "responsible for office affairs," this description is so broad it does not clarify with certainty the boundaries of her duties. Furthermore, the response to the request for evidence and organizational chart do not establish what "information technology specialist" means in terms of position title and obligations for [REDACTED]. Finally, the position descriptions of the two employees identified in the sales area are so vague that it is impossible to ascertain the exact nature of their duties and of the level of authority they possess. All of these questions remain unanswered despite the documentation submitted by the petitioner. As previously stated, 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. at 1103.

The petitioner, therefore, has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although the organizational chart indicates that [REDACTED], Sales Manager, oversees [REDACTED] identified as a sales associate, the exact nature of their duties and their resulting relationship is not discussed in detail. As stated above, the vague description of the duties of the petitioner's employees precludes the AAO from finding that the beneficiary is functioning in managerial or executive capacity, since this lack of detail prevents the AAO from evaluating the level of

authority vested in these employees. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Moreover, counsel continually concludes on appeal that the beneficiary is the president of the organization and that he has been performing managerial and executive duties, and thus qualifies for the requested L-1 classification. For example, counsel states "[e]vidently, as a president of the company, the beneficiary is performing primarily the duties that are characteristic of duties performed by a manager or executive." However, there is no independent evidence to support these assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, counsel further refers to several unpublished decisions in which the AAO determined that a 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 decisions; in fact, counsel merely states the holding of these cases in a concise sentence, then concludes that the beneficiary is qualified as a result of these holdings. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding. And once again, the assertions of counsel do not constitute evidence. *Id.*

While counsel's reliance on these unpublished decisions is not binding on the AAO, counsel correctly notes 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). Pursuant to these sections, 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 the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Absent evidence to the contrary, it is not evident from the description of duties provided and from the current organizational structure of the company that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On review, 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 petitioner indicates that it plans to hire additional employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an

extension. Since the record lacks any credible evidence which describes in detail the nature of the beneficiary's duties, the AAO must conclude that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." In this matter, the petitioner claims that it is engaged in international trade, namely, the import and distribution of "high intensity discharge (H.I.D.), wiring system, automotive lamps, automotive fuses, automotive valves, and connector." The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

With the initial petition, the petitioner provided a copy of its commercial lease, executed on October 1, 2003, as well as a brochure of its products, its application for a U.S. trademark, its advertisement in the Chinese yellow pages, copies of bank statements, and numerous invoices. On February 12, 2004, the director issued a request for the petitioner's original and current business plans, including 1 year, 3 year, and 5 year projections. The petitioner complied with this request, after which the director issued a second request for evidence asking for comprehensive evidence that the petitioner was doing business in the United States. The AAO notes that this second request for evidence requested many of the documents already submitted by the petitioner. The petitioner resubmitted the requested documents.

The director denied the petition on August 18, 2004, primarily relying on the petitioner's U.S. Corporation Income Tax Return for 2003, which demonstrated a negative income. On appeal, the petitioner did not address or acknowledge this additional basis for the denial.

On review of the evidence submitted, the AAO concurs with the director's finding that the petitioner did not establish that it had been doing business during the previous year as defined by the regulations. The petitioner submitted numerous invoices evidencing sales transactions by the U.S. entity performed consistently from July 2003 through August 2003, along with evidence of sales and marketing correspondence for the previous months; however, no additional documentation demonstrating the petitioner's business dealings from December 2002 through June 2003 and from September 2003 to December 2003 has been submitted. The AAO notes that although the petitioner claimed to earn approximately \$130,000 in sales from April 2003 forward, there is insufficient evidence in the record to corroborate this claim. The AAO further notes that the petitioner's tax return for 2002, covering the period from April 1, 2002 through March 31, 2003, indicates a negative income and minimal sales in the amount of \$6,000.

In addition, the AAO notes that business was slow to start in the wake of the beneficiary's arrival in December of 2002. However, the regulation requires the petitioner to demonstrate that it has been doing business for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of invoices suggesting that it has been selling its goods on a regular basis. However, the earliest invoice

documenting the sale of the petitioner's goods dates back to July 2003. However, the petition was approved in December 2002. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from December 2002 through June 2003, or again after August 2003.

In this matter, the petitioner has failed to submit evidence that it regularly and systematically provided services for the entire period preceding the filing of the extension request. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Based on this information, it cannot be concluded that the petitioner was in fact doing business for the prior year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until October 2003, approximately ten months after the approval of the original new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the initial petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition 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.