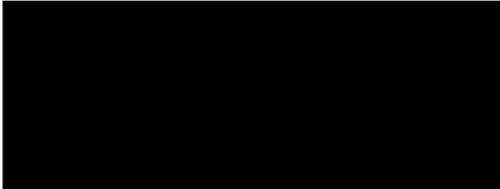




U.S. Citizenship
and Immigration
Services

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File: EAC 04 140 52046 Office: VERMONT SERVICE CENTER Date: **MAY 11 2006**

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

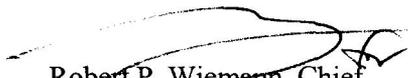
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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 petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Delaware corporation that claims to be engaged in the marketing of plastic extrusions and fence panels. The petitioner claims to be a subsidiary of [REDACTED], located in Kfar Ruppin, Israel. The petitioner seeks to employ the beneficiary as its marketing manager for a one-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, or (2) that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity.

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 beneficiary “will fulfill a managerial and/or executive and/or a capacity requiring specialized knowledge” and therefore qualifies for the benefit sought. The petitioner provides more detailed descriptions of the beneficiary’s duties with the foreign entity and proposed duties with the United States entity, and claims that the beneficiary manages an essential function of the business.

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 this matter is whether the petitioner established that 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 petition was filed on April 8, 2004. In an attachment to Form I-129, the petitioner provided the following description of the beneficiary's proposed duties in the United States:

To open new markets, to widen existing markets, to contact new clients, to set up local sales networks, to serve as a liaison between Israeli parent company, who does the manufacturing, and the American subsidiary, who does the marketing, utilizing his bilingual knowledge of English and Hebrew. Responsibility for meeting and adapting the products to the technical and commercial demands of the clients, utilizing his unique expertise and knowledge of the Israeli Company's manufacturing procedures and capabilities.

In an April 4, 2004 letter, the petitioner stated that the beneficiary "is knowledgeable about our lines of products and to which uses they can be used in the US market, and experience marketing the products." The petitioner stated on Form I-129 that the company has 12 employees, but did not submit an organizational chart or provide any information regarding the U.S. company's staffing or the placement of the beneficiary's proposed position within its organizational hierarchy.

The director requested additional evidence on April 20, 2004, in part instructing the petitioner to submit: (1) a list of the U.S. employees identifying each employee by name and position title; (2) a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary; (3) an organizational chart for the U.S. company showing each of the twelve employees within the office; (4) a copy of each employee's Form W-2 for 2003; (5) a copy of the petitioner's payroll register for March 2004; and (6) a copy of the petitioner's Form 941, Quarterly Federal Tax Return for the third quarter of 2003.

In a response dated May 14, 2004, the petitioner provided a list of its current employees and very brief job descriptions for each position. The petitioner stated that: the president manages all activities of the organization, sales, operations and finance; the sales and marketing coordinator performs telephone sales, coordinates marketing and advertising, develops office procedures and supervises the customer service representative; the customer service representative enters orders, performs general bookkeeping, telephone sales and coordinates shipping; the sales manager, New England develops sales in the six states of New England; the shop supervisor directs shop employees, schedules work and manufactures fencing; and two fabricators manufacture fencing. The petitioner's payroll summary for the period ended March 19, 2004 confirmed the employment of the listed employees, with the exception of one of the fabricators.

The petitioner submitted an organizational chart, but did not identify the beneficiary's proposed position on the chart. The petitioner failed to provide the requested breakdown of job duties for the beneficiary and the other employees as requested by the director.

The director denied the petition on May 26, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director noted that the petitioner had failed to provide the requested description of the beneficiary's proposed position, and therefore it could not be determined whether he would be performing duties of a managerial or executive nature. The director further found that the petitioner does not have a reasonable need for another managerial or executive employee to supervise the company's sales and marketing activities. The director determined that the petitioner had not established that the beneficiary would supervise a staff of supervisory, professional or managerial employees or that he would manage an essential function. The director also

concluded that the position could not be considered executive in nature, as there was no evidence submitted to establish that the beneficiary would direct the management of the organization or a major component or function of the organization.

On appeal, the petitioner asserts that the beneficiary will be employed in a position that qualifies under the definition of managerial or executive capacity. The petitioner does not elaborate as to how the beneficiary would qualify as an executive, but asserts that the beneficiary will manage an essential function of the organization, rather than supervising managerial, professional or supervisory employees in the United States. The petitioner acknowledges that it submitted “a general description” of the beneficiary’s proposed position with the initial petition, and now submits a more detailed account of his duties on appeal.

Upon review, the petitioner’s assertions are not persuasive. As a preliminary matter, the AAO will address the evidence submitted by the petitioner on appeal, namely, the job description contained in the petitioner’s appellate brief. Prior to adjudicating the petition, the director requested that the petitioner submit a more detailed job description for the beneficiary, including the number of hours the beneficiary would spend on each of his duties on a weekly basis, as well as similar job descriptions for the petitioner’s other employees. The petitioner was also asked to provide an organizational chart identifying all twelve of its claimed employees. The petitioner was provided 84 days in which to submit a response to the director’s request for additional evidence. In response, the petitioner opted to provide no additional information regarding the beneficiary’s proposed position, very limited descriptions of the positions held by the other employees, and an organizational chart which failed to identify the placement of the beneficiary’s proposed position within the U.S. company’s organizational hierarchy. Although the petitioner claimed to employ twelve employees as of the date of filing, the petitioner’s payroll records for the month preceding the filing of the petition confirmed the employment of only six people.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). 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. *Id.* The appeal will be adjudicated based on the record of proceeding before the director.

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 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. 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 chooses to represent 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.

The director properly concluded that the job description provided was too vague to convey an understanding of the actual duties the beneficiary would perform in the offered position. For example, the petitioner indicated that the beneficiary would "open new markets," "widen existing markets," "contact new clients," and "set up local sales networks," but failed to explain how these duties would qualify as either managerial or executive under the statutory definitions. Without additional explanation, or evidence that he would be directing lower-level employees to perform non-qualifying duties associated with sales, marketing and business development, the record suggests that he would be directly involved in marketing the petitioner's products and soliciting sales. The petitioner also indicated that the beneficiary would be responsible for "meeting and adapting the products to the technical and commercial demands of the clients," relying on his knowledge of the foreign entity's manufacturing capabilities. Again, the petitioner did not explain how the beneficiary's responsibility for recommending product adaptations would qualify as either managerial or executive in nature. 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 answer a critical question in this case: What will the beneficiary primarily do on a daily basis? 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 AAO cannot attempt to define the beneficiary's actual duties in the absence of the job description required by 8 C.F.R. § 214.2(l)(3)(ii), and specifically requested by the director. 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)).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. In the instant matter, the provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform such that they can be classified as managerial or executive in nature. The petitioner did not indicate that the beneficiary would supervise employees, nor did it identify the beneficiary's proposed position in its organizational chart, which makes it impossible to conclude that the beneficiary would be relieved from performing non-qualifying duties associated with the petitioner's day-to-day sales and marketing activities. Based on the lack of evidence regarding the beneficiary's duties and how he will perform them, it cannot be concluded that the beneficiary would perform primarily managerial or executive duties.

The AAO acknowledges the petitioner's claim on appeal that the beneficiary would serve as a function manager of the petitioning 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, 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 detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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 correctly observes that the holder of a managerial position is not excluded from fulfilling "some of the direct tasks included in the function by himself," thus implying that the beneficiary would perform some non-qualifying tasks. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner claims the beneficiary's duties are managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's vaguely defined duties, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. 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 or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The petitioner has not presented evidence to establish that the beneficiary would serve in a qualifying executive capacity in the United States. 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.* The petitioner has not submitted evidence to establish that the beneficiary would be employed by the petitioner in an executive capacity.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity.

The petitioner stated on Form I-129 that the beneficiary was employed as the foreign entity's marketing manager from 1999 until 2004, but did not provide a description of the beneficiary's duties.

Accordingly, the director requested additional evidence to establish that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. The director instructed the petitioner to provide an organizational chart for the foreign entity, a list of the company's employees by name and job title, a complete position description for each of the foreign entity's employees, and a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

In response, the petitioner submitted an employee list for the foreign entity, identifying 43 employees by name and job title. The beneficiary is identified as "Fence Profiles, Marketing & Sales Manager," and the list includes two other employees in the same department, who are identified as "logistics" and "educational aids sales." The petitioner did not provide the requested complete job description for the beneficiary or for the foreign entity's other employees. The petitioner submitted the foreign entity's organizational chart, but it does not list employees by name and job title. The chart includes a marketing department over a "secretary & logistics" employee and an "export-salesman." Neither the employee list nor the organizational chart identifies any other employees who would appear to be engaged in sales or marketing functions.

The petitioner also submitted the beneficiary's resume, which indicates that his duties with the foreign entity have included "developing [the foreign entity's] distribution network in the U.S." and serving as director of sales and marketing "of PVC profiles worldwide."

The director denied the petition concluding that the petitioner had not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. The director noted that the petitioner had failed to provide a position description for the beneficiary's role with the foreign entity, and submitted no other evidence to substantiate that he was actually performing duties in a managerial or executive capacity. Based on the limited information provided regarding the beneficiary's subordinates, the director determined that the beneficiary was likely responsible for performing non-qualifying marketing duties for the foreign entity, regardless of his job title, and that he was not supervising professional, managerial or supervisory personnel.

On appeal, the petitioner provides a brief description of the beneficiary's duties with the foreign entity, noting that he "managed the entire department of sales," and was responsible for "holding marketing surveys, directing the development for developing products and their adaptation [sic] to the market's needs, developing marketing strategies and policies, and directing and overseeing the sales representatives' activities." The petitioner identifies three employees who are claimed to perform sales and marketing duties under the beneficiary's supervision, two of whom were not included on the employee list dated March 2004. The petitioner does not provide any additional information regarding how the beneficiary's role with the foreign entity qualifies as managerial or executive in nature.

Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. The record at the time of adjudication contained no description of the duties performed by the beneficiary in his current position with the foreign entity. The regulations require a detailed description of the duties to be performed in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3). 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. 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). For this reason, the appeal will be dismissed.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Again, under the circumstances, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). 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. *Id.* Even if the AAO considered the evidence submitted on appeal, the petitioner has provided only a vague outline of the beneficiary's position that fails to identify how the beneficiary's duties with the foreign entity were managerial or executive in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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 has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity.

Finally, the AAO acknowledges the petitioner's assertion that the beneficiary alternatively meets the requirements for employment in an L-1B specialized knowledge capacity, even if he is found ineligible for classification as an L-1A nonimmigrant intracompany transferee. However, the petitioner clearly indicated on Form I-129 that it was seeking to employ the beneficiary in a managerial or executive capacity. Counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a

specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1B specialized knowledge classification is, therefore, denied.

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.