

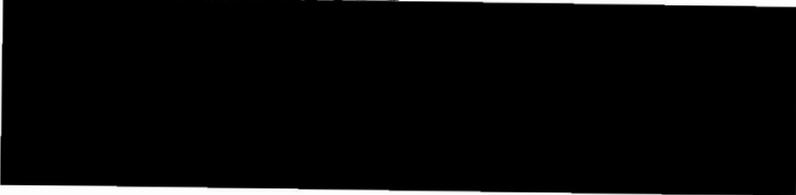
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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
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Services

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SEP 05 2006

File: SRC 04 196 51441 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



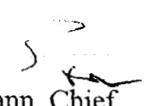
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its director 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 limited liability company organized under the laws of the State of Florida and is allegedly engaged in the business of aviation training. The petitioner claims that it is the subsidiary of Atlantic Flight Training Ltd., located in the United Kingdom. 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.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred and that the beneficiary's duties are executive in nature.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory

duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clearly state whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and implies in its petition that the beneficiary is acting as both. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. While the petitioner does identify the position as "a professional level executive position" and seems to have narrowed its argument on appeal by asserting that the beneficiary is acting in a primarily "executive" capacity, the AAO will nevertheless analyze the beneficiary's duties from both a managerial and executive perspective.

In a letter dated June 25, 2003 attached to the initial I-129 petition, the petitioner described the beneficiary's job duties as follows:

Ensuring [the petitioner], and its parent company, meet the terms of its contract with Delta Connection Academy regarding the training of Professional Commercial Pilots to Joint Aviation Authority (JAA) standards. The course is specifically designed for the training of European pilots in the U.S. [The petitioner] is contracted to provide elements of the training by Delta Connection Academy.

Supervising the financial and operational activities of [the petitioner].

Supervision and administration of all [the petitioner's] personnel.

Ensuring that the company obtains and retains all necessary JAA approvals required to operate the courses in the U.S.

Supervising the writing and delivery of all course materials.

Supervising the welfare and training of [the] students.

The petitioner also indicated in its Form I-129 that the petitioner employs four people.

On August 26, 2004, the director requested additional evidence. Specifically, the director requested the following:

- 1) Explain what the employee duties are and their education background. (Submit a copy of their degree, if the degree is from a foreign country, you must submit an evaluation showing it is [equivalent] to U.S. Baccalaureate Degree)[.]
- 2) Submit the organizational chart of the U.S. Company listing the title, and position.
- 3) Explain how the beneficiary will not engage in the day to day operations of the business, and he will primarily be engaged in managerial or executive duties. Submit evidence the beneficiary is managing other managers and professionals.
- 4) Submit copies of the Employer's State Quarterly Tax Return with all the attachments for the past two quarters. Submit proof that payments have been made to the Internal Revenue Service for [the petitioner] (Submit all pages including social security numbers)[.]
- 5) Submit 940 EZ Employers Annual Federal Unemployment Tax Return for [the petitioner] (Submit all pages including social security numbers)[.]

In response, the petitioner submitted an organizational chart showing the beneficiary at the top of the organization supervising two individuals (head of training and director of ground operations). The head of training supervises a third employee, a senior instructor. While the chart identifies other positions (standards director and ground training instructors), these positions are apparently vacant.

The petitioner also provided details regarding the beneficiary's job duties and the duties of the two employees being supervised by the beneficiary:

**Director**

Provide leadership and overall direction for company  
Administer contract with Delta Connection Academy including strategic planning, negotiation and problem resolution with DCA officials  
Liaison with Atlantic Flight Training Ltd. – parent company in UK  
Evaluate and manage professional personnel  
Supervise Director of Training in Administration of JAA theoretical knowledge courses  
Supervise Director of Operations in retaining approval for JAA courses

**Head of Operations**

Prepare documentation to retain approval for all Joint Aviation Authority theoretical knowledge courses  
Supervision of the writing and delivery of course material

Supervision of the welfare and training of Atlantic Flight Training/Delta Connection Academy Students  
Administration of Personnel including recordkeeping, human resources management

**Head of Training**

Oversee ground school classes  
Provide leadership and direct supervision for Ground Instructors  
Interview and Hire New Instructors  
Maintain standards and compliance with applicable regulations and accreditation standards

The petitioner also supplied degree and experience information for the head of training and the head of operations revealing that one of the two employees (head of training) holds the equivalent of a U.S. bachelor's degree.

Finally, while the petitioner provided tax returns and related data, the petitioner explained that the petitioner, as a limited liability company having one member, is a "disregarded entity" and that all tax reporting is being done instead by the parent company. The petitioner also explained that the parent company is directly compensating the subordinate employees. Thus, the employment tax data for the petitioner may give the false impression that the head of training and the head of operations are not being employed when, in fact, they are being employed directly by the parent company in the United Kingdom.

On October 13, 2004, the director sent the petitioner an Intent to Deny requesting more information regarding the employment of the subordinate employees and further evidence (sales receipts and invoices) showing that the petitioner is currently doing business.

In response, the petitioner provided evidence of business activity and more tax documentation proving the employment of the head of training by the parent company.

On January 3, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director determined:

The record does not support a finding that the petitioner will be supervising a subordinate staff of professionals, or managers. It has been determined based on the totality of the evidence the beneficiary will not primarily be engaged in managerial or executive duties. The duties of the beneficiary were general in nature and did not establish the beneficiary engaged in executive duties.

**On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive. The petitioner argues that the director erred in determining that the beneficiary's duties were too general and that the beneficiary will be supervising two professional employees.**

Upon review, the petitioner's assertions are not persuasive. Title 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 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position as defined by law.

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

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity. In support of its application, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include ensuring that the petitioner meets the terms of its contract, supervising the operational activities of the petitioner, and providing leadership. The petitioner did not, however, define the beneficiary's role on a day-to-day basis or explain how much of his time is dedicated to each these duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).<sup>1</sup> 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).

Equally important, the petitioner failed to clarify who actually will do the work that is being managed and, if the two subordinate employees identified in the petitioner are performing services, that these employees are professionals. The petitioner supplied job descriptions and an organizational chart indicating that the beneficiary manages two "professional" employees (head of operations and head of training) and will supervise a third "professional" employee once hired. While the petitioner asserts that ground training instructors (supervised by the senior instructor who, in turn, answers to the head of training) will be hired in the future, the record is devoid of any evidence that said instructors have been hired or are currently providing services. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa

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<sup>1</sup> While the petitioner did provide a job description explaining what percentage of time he dedicates to each duty, the petitioner attributes this description to the beneficiary's position overseas and not to the position with the petitioner. Therefore, this job description is not relevant to this analysis.

petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the only employees available to provide services are the two employees directly supervised by the beneficiary and the senior instructor who is supervised by the head of training. Given this organizational structure, the employees supervised by the beneficiary must be proven to be "professionals" in order for the beneficiary to be acting in a "managerial" capacity, since there is no evidence that they are acting primarily in supervisory or managerial capacities.

The two existing employees (head of operations and head of training) are vaguely described as supervising and overseeing functions as well as providing certain services, i.e., preparing documentation and maintaining standards. The third employee (senior instructor) is not described. While the petitioner did provide evidence that the head of training possesses the equivalent of a U.S. bachelor's degree, the petitioner did not provide any evidence that the possession of a bachelor's degree is required for entry into that position. Since the head of operations does not possess the equivalent of a bachelor's degree, possession of said degree or its equivalent is apparently not necessary for entry into that position. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). Since the record fails to reveal the educational or skill level necessary for entry into the position of head of training, and the position of head of operations clearly does not require a bachelor's degree or its equivalent, the two positions have not been proven to be professional in nature.<sup>2</sup> Moreover, since the vague job descriptions for the two subordinate managers fail to document what proportion of their duties would be managerial, the two positions have not been proven to be primarily supervisory or executive in nature. Therefore, the record does not establish that the beneficiary is acting in a managerial capacity.<sup>3</sup>

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The

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<sup>2</sup> In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>3</sup> Also, because the petitioner admits that the two existing employees are not employees of the petitioner, the beneficiary's supervision of them is not sufficient under the Act and the regulations. As stated in the Act, a managerial employee must supervise and control the work of other supervisory, professional, or managerial employees. 101(a)(44)(A) of the Act. Employees of the parent company are not employees of the petitioner, and the beneficiary's supervision of them is non-qualifying.

statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, while the petitioner may have provided a vague job description which reiterates the regulations, the petitioner has failed to prove that the beneficiary, who is allegedly managing no more than three employees who are apparently engaged in providing services, will be acting primarily in an executive capacity. Moreover, given the beneficiary's mid-level position within the parent company as evidenced by the organizational chart supplied by the petitioner and the fact that the parent company, and not the petitioner, controls the employment of all the beneficiary's subordinates and bears the financial risks associated with venture, the beneficiary cannot be said to be an executive as defined by statute.

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

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, Citizenship and Immigration Services does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. *Id.* Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.