

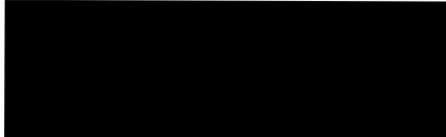


U.S. Citizenship
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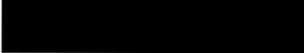
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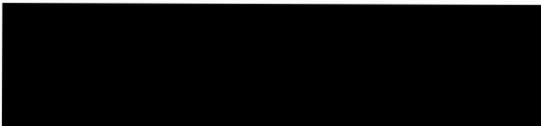


File: WAC 07 252 54199 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

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, California 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 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 corporation organized under the laws of the State of Illinois and is allegedly a "manufacturer and distributor of flexible magnetics."

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, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of a manager.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The 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 clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Although the petitioner discusses the beneficiary's duties only in the context of the managerial classification, the petitioner does not clearly limit the beneficiary to this classification. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed as either a manager *or* an executive and will consider both classifications.

The petitioner describes the beneficiary's proposed duties as "sales manager responsible for the day[-]to[-]day sales and marketing activities and development" in a letter dated August 22, 2007 as follows:

1. Recruit and employ new personnel for the purpose of expanding and establishing Sales department.
2. Coordinate sales distribution by establishing sales territories quotas, advising dealers, distributors, and clients concerning sales and advertising techniques.
3. Analyze sales statistics to formulate policy and assist in promotion of product.
4. Train new personnel in the techniques and management of sales once the new employees are recruited.
5. Review market analyses to determine customer needs, volume potential, prices, and discount rates.
6. Set goals and objectives of the sales department.
7. Directed all activities of sales, set budgets, and manage day[-]to[-]day activities of the sales function of the US Company.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary reporting to the board of directors and supervising an unnamed "sales" employee and a "sales rep." The chart also implies that these subordinates will recruit additional workers. Finally, the chart indicates that the "customer service" employee, [REDACTED] reports to the general manager and will not report to the beneficiary as "sales manager."

On September 9, 2007, the director requested additional evidence. The director requested, *inter alia*, a description of the duties and educational backgrounds of the beneficiary's proposed subordinate employees; a more detailed description of the beneficiary's proposed duties in the United States, including a breakdown of the percentages of time she will devote to each of her ascribed duties; copies of the petitioner's quarterly wage reports for the last four quarters; evidence that the beneficiary will supervise and control the work of supervisory, managerial, or professional employees, or will manage an essential function of the organization; and copies of the petitioner's tax returns.

In response, counsel submitted a letter dated September 20, 2007 in which the beneficiary's proposed duties are further described as follows:

- A[.] Recruit and employ new personnel for the purpose of expanding and establishing sales department. The beneficiary has placed ads [on the internet] to actively recruiting [sic] personnel. Interview prospective employees, evaluate their qualifications, check references and to determine the suitability for the position. Exercise authority to hire and terminate. The beneficiary also reviews and evaluates the existing personnel performance, and decide how long the probation period and what the basic wage is to be and when the salary should be raised. 5%
- B. Coordinate sales distribution by establishing sales territories, quotas. Advising dealers, distributors and clients coordinating sales. Instruct employees with advertising techniques. Take responsibilities in advising and demonstrating the correct usages of the company's products. Demonstrate to customers the purpose, advantages and right way of using the products, advising the variety of products available, delivering dates estimate, and cost. Contact old and new customers; follow

up on discussions to promote sales. 15%

- C. Analyze sales statistics to formulate policy and assist in promotion of product. Review and analyze sales statistics, volumes of sales, customer preferences and determine products are profitable or less profitable. Analyze any comments from clients to determine whether certain products need improvement, modification or even eliminate. Devise strategies to increase sales. 15%
- D. Train new personnel in the techniques and management of sales once the new employees are recruited. Conduct individualized instructions to show and have the new employees acquainted with the company's products. Indoctrinate employees in the company's philosophy, goals and policies and the directions the company is aiming to develop. 5%
- E. Review market analysis to determine customer needs, volume potentials, prices, and discount rates. This analysis is in conjunction with the analysis of sales statistics to determine individual customer's particular needs, their volume potentials, and provide any discount rates, if applicable. Introduce new products to customers as they grow and increasing [sic] their needs. 15%
- F. Set goals and objectives of the sales department. Set definite quota as to possible sales for the quarter, and set goals for percentage increase for the sales every quarterly [sic]. Review quarterly sales to review sales goals and objectives, modify and re-set goals and objectives as needed. Devise strategies to increase sales. 20%
- G. Direct all activities of sales and budgets, and manage day[-]to[-]day activities of the sales function of the US Company. Manage and exercise discretion over sales department day[-]to[-]day functions. Review sales department budgets to see whether it exceeds the budgetary limits, or request additional budgets if needed. Determine allocation of budgets as to set priorities as a particular time in sales. Oversee accurate recording of sales as to the accounts, volume and items of sales. Compile statistics and reports. 25%

The petitioner also submitted a "revised" organizational chart, which portrays the beneficiary as supervising an internal sales worker, a sales representative, an administrative assistant, and "outside sales." The beneficiary's proposed subordinate workers are described as follows:

- 1. – Internal Sales. Responsibilities; Assist sales manager in devising market and sales strategies. Gather and compile reports for beneficiary's review, assist in researching customer's preferences, volume of sales as to particular items.
- 2. – Sales Representative. He is to represent company in selling of products. He demonstrates the usages, advantages, and strength of the products. Establish sales strategies, establish and expand sales territories.
- 3. Administrative Assistant. She is to maintain all records of sales, clients

list, employment records, internal/external and overseas correspondences, record minutes of all meetings, upkeep records. Check and maintain inventories.

The petitioner did not submit any evidence pertaining to the educational backgrounds of the proposed subordinate workers.

It is noted that the "revised" organizational chart, as well as the list of the beneficiary's proposed subordinate workers, differs materially from the evidence submitted with the initial petition. The original organizational chart indicates that [REDACTED] is a "customer service" employee and that she will not report to the beneficiary. Likewise, the original organizational chart fails to list the administrative assistant. Accordingly, it appears that the administrative assistant was hired after the filing of the instant petition.

Finally, the petitioner submitted copies of its quarterly wage reports. The wage report for the second quarter of 2007, the quarter immediately preceding the filing of the instant petition, indicates that the petitioner employed one person.

On October 8, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager.

Upon review, counsel's assertions are not persuasive.

As a threshold issue, it must be noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa 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). Accordingly, the petitioner's hiring of the administrative assistant or other workers after the filing of the instant petition may not be considered. Furthermore, the petitioner's future hiring and business expansion plans may not be considered in determining whether the beneficiary will primarily perform qualifying managerial or executive duties immediately upon petition approval. A visa petition may not be approved based on speculation of future eligibility. *See id.*; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Moreover, it is noted that the petitioner's attempt to submit a materially different organizational chart in response to the director's Request for Evidence which shifts the supervisory responsibility over the "internal sales" worker to the beneficiary from the general manager was inappropriate and will not be recognized by the AAO on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary or her subordinate workers, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. As noted above, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in

the record. Accordingly, based on the organizational structure in place at the time the petition was filed, the only worker that the petitioner claims will be supervised by the beneficiary is the "sales representative," [REDACTED]

In view of the above, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity in the United States.

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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act primarily in a "managerial" or "executive" capacity. To the contrary, the petitioner has submitted a job description which describes the beneficiary as primarily performing sales and marketing tasks which do not rise to the level of being managerial or executive duties. For example, the petitioner asserts that the beneficiary will devote most of her time to recruiting sales personnel, establishing sales territories and quotas, analyzing sales statistics, training personnel, and reviewing market analyses. However, these sales and marketing duties are tasks necessary to the provision of a service or the production of a product, or are the duties of a first-line supervisor, and are not qualifying managerial or executive duties. Furthermore, given that the beneficiary will supervise only one worker, a "sales representative," the record is not persuasive in establishing that the beneficiary will be relieved of the need to perform the non-qualifying sales and marketing tasks inherent to her position. Accordingly, it must be presumed that the beneficiary will perform these tasks. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary will actually perform managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the original organizational chart, the beneficiary will directly supervise a "sales representative." However, the record is not persuasive in establishing that this worker is a supervisory, managerial, or professional employee. The record does not indicate that the sales representative will supervise any subordinate workers. Furthermore, the petitioner failed to describe the educational background or skills necessary to perform the duties of the sales representative, even though this evidence was 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). Accordingly, it cannot be concluded that the "sales representative" is a professional employee.¹ In view of the above, it appears that the beneficiary will more likely than not primarily perform non-qualifying administrative or operational tasks or will be, at most, a first-line supervisory of non-professional workers. See generally *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole

¹In evaluating whether the beneficiary will manage 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).

²Counsel argues on appeal that the beneficiary will manage an essential function of the organization. However, the record does not support this argument. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary 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. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. Instead, the petitioner's job description indicates that the beneficiary will more likely than not perform the tasks related to the sales function and serve as a first-line supervisor of a subordinate sales representative. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. As explained above, it appears instead that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner described the beneficiary's job duties abroad as a "sales manager" in a letter dated August 22, 2007 as follows:

- Direct staffing, training, and performance evaluations to develop and control sales program.
- Coordinate sales distribution by establishing sales territories quotas, and goals – advising dealers, distributors, and clients concerning sales and advertising techniques.
- Assign sales territory to other managerial personnel and analyze sales statistics to formulate policy and assist in promotion of product.
- Review market analyses to determine customer needs, volume potential, price schedules, and discount rates.
- Direct product simplification and standardization to eliminate unprofitable items from sales line.
- Employ and terminate personnel within the department not inconsistent with [the foreign employer's] policies of personnel management.

The petitioner also submitted an organizational chart for the foreign employer. However, the chart fails to establish its personnel structure and does not specifically identify the beneficiary's position within the foreign employer's organizational hierarchy.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. First, the beneficiary's job description fails describe the beneficiary as primarily performing managerial or executive duties abroad. Similar to the proposed United States position, it appears that the beneficiary primarily performed non-qualifying sales and marketing tasks and/or served as a first-line supervisor of sales workers. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the beneficiary's purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. It is also impossible for CIS to determine whether she was relieved of the need to perform non-qualifying tasks by a subordinate staff or whether she supervised and controlled other managerial, supervisory, or professional employees, or managed an essential function. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In this matter, the petitioner claims that it is 90% owned by the foreign employer and, thus, is a "subsidiary" as defined by the regulations. However, the record contains inconsistencies which undermine this claim. For example, the petitioner's 2006 Form 1120, U.S. Corporation Income Tax Return, indicates in Schedule K that the petitioner is not a subsidiary, that no one entity owns 50% or more of the petitioner's stock, and that 25% of the petitioner's stock is not owned by a foreign entity. All three of these averments are inconsistent with the petitioner's claim to be 90% owned by a Chinese business entity. The petitioner offers no explanation for this fundamental inconsistency in the record pertaining to its ownership and control. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

