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File: EAC 07 087 52417 Office: VERMONT SERVICE CENTER Date: FEB 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, 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 visa petition seeking to employ the beneficiary as an operations manager 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 Delaware and is allegedly a metals vendor.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary was employed abroad in a primarily managerial or executive capacity; or (2) 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 function 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 first issue in the present matter is whether the beneficiary was employed abroad in a primarily managerial

capacity.¹

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.

The petitioner described the beneficiary's duties abroad in a letter dated February 5, 2007. As this letter is in the record, this job description will not be repeated here.

On February 21, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's claimed managerial duties, a description of the duties of the beneficiary's subordinate workers, and an organizational chart.

In response, counsel submitted a letter dated March 1, 2007 in which he describes the beneficiary's duties abroad as follows:

[The beneficiary's] duties include managing [the foreign employer's] relationship with customers on a daily basis by giving direct quotes and following up on cold calls, pricing and profitability of specific sales orders; managing the operations and processes of the sheet department by assigning daily and hourly tasks and utilizing capital and assets to perform the daily tasks in the most efficient yet effective way possible; and responsibility for the safety of the operation, following the department's rules and regulations of safety and secure operation

¹As counsel asserts both in the letter dated March 1, 2007 and on appeal that the beneficiary has been and will be employed as a manager, the AAO will limit its consideration to the managerial classification. As counsel does not assert that the beneficiary has been or will be employed in an executive capacity, the AAO will not consider this classification on appeal.

to minimize accidents or injuries while preparing orders for customers. He manages 5 employees in each shift, which include warehouse employees, forklift operators, and quality control inspectors. [The beneficiary's] position requires excellent communication skills, the ability to handle multiple tasks simultaneously, organizational skills, and computer skills for managing work and assignments. [The beneficiary] needs to solve problems and conflicts in schedules due to the high volume of orders, and give direction and clear tasks to his employees. At [the foreign employer], leadership by example is the norm, and [the beneficiary] leads his teams by showing, training and guiding them throughout the day. He spends 70% of his time on managerial duties and 30% on other duties. He has full autonomy to make decisions within his department.

The petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary's position, which is marked with asterisks, reporting to an operation manager and supervising a "warehouse team." The beneficiary's position is described in the chart as "Warehouse No[.] 2 Shift Manager." Counsel described the duties of the "warehouse team" in the letter dated March 1, 2007 as follows:

At [the foreign entity], [the beneficiary] manages warehouse employees, forklift operators, and quality control inspectors. Their job duties are described by their job titles; namely, working in the warehouse, operating forklifts, and inspecting products for quality control.

On March 12, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad primarily in a managerial or executive capacity.

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

Upon review, counsel's assertions are not persuasive.

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 performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary was employed abroad in a "managerial" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did on a day-to-day basis. For example, the petitioner states that the beneficiary was responsible "for the safety of the operation, following the department's rules and regulations of safety and secure operation" and that he led "his teams by showing, training and guiding them throughout the day." However, the petitioner does not specifically explain what, exactly, the beneficiary did in performing these broad duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary actually performed managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were 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). 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).

Likewise, the duties ascribed to the beneficiary appear to be primarily non-qualifying administrative or operational tasks which will not rise to the level of being managerial in nature. For example, the petitioner asserts that the beneficiary gave "direct quotes" and followed up on "cold calls, pricing and profitability of specific sales orders." However, such sales and marketing duties are non-qualifying administrative or operational tasks. Furthermore, as the petitioner has failed to establish that any of his subordinate employees is a supervisory, managerial, or professional worker (*see infra*), the supervisory functions ascribed to the beneficiary are non-qualifying, first-line supervisory tasks. As the petitioner has not established how much time the beneficiary devoted to these non-qualifying tasks, it has not been established that he was "primarily" employed as a manager. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).²

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As indicated above, the beneficiary directly supervised "5 employees in each shift, which include warehouse employees, forklift operators, and quality control inspectors." However, these employees are not described as having supervisory or managerial responsibilities. To the contrary, these employees are vaguely described as performing warehousing related tasks. In view of the above, the beneficiary would appear to have been primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. 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. Moreover, as the petitioner failed to establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed professional employees.³ Therefore, the petitioner has not established that the beneficiary was employed abroad primarily in a managerial capacity.

²While the petitioner asserts that the beneficiary spent "70% of his time on management duties," this conclusory statement is not persuasive in establishing that the beneficiary was primarily employed as a manager. The petitioner failed to identify which of the ascribed duties consumed 70% of his time. Once again, 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.

³In evaluating whether the beneficiary managed 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

The petitioner has also not established that the beneficiary managed an essential function of the 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary managed an essential function, the petitioner must furnish a written job offer that clearly describes the duties 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 managed the function rather than performed the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function of the organization abroad. As noted above, the petitioner's job description fails to clearly document that the beneficiary's duties were primarily managerial. 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 were managerial, nor can it deduce whether the beneficiary primarily performed 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 mere fact that the beneficiary may have supervised non-professional workers performing tasks will not establish that he was a "function manager." As explained above, first-line supervisory duties are, by definition, non-managerial tasks. 101(a)(44)(A)(iv) of the Act. "Function managers" must perform primarily managerial duties, which do not include being a first-line supervisor. In this matter, the petitioner describes the beneficiary as "assigning daily and hourly tasks" and as leading by example by "showing, training and guiding [his subordinates] throughout the day." Such tasks are not qualifying managerial duties, and the performance of such tasks will not establish that the beneficiary was employed in a primarily managerial capacity.

Accordingly, the petitioner has failed to establish that the beneficiary was primarily performing managerial duties abroad, and the petition may not be approved for that reason.⁴

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).

⁴It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of his contention that the beneficiary is primarily employed as a function manager. In that decision, the AAO recognized that the sole employee of the petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Third, as explained above, the petitioner has not established that the beneficiary will primarily be employed in a managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager if he or she will not primarily perform managerial duties regardless of the number of people employed by the petitioning

The second issue in the present matter is whether the petitioner established that the beneficiary will be employed in a primarily managerial capacity in the United States.

The petitioner described the beneficiary's proposed duties in a letter dated February 5, 2007. As this letter is in the record, the job description will not be repeated here.

On February 21, 2007, the director requested additional evidence. The director requested, *inter alia*, detailed job descriptions for the beneficiary and all subordinate employees, a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, and an organizational chart.

In response, counsel submitted a letter dated March 1, 2007 in which he describes the beneficiary's proposed employment in the United States as follows:

[The beneficiary] will manage warehouse employees, forklift operators, and quality control inspectors. Their job duties are described by their job titles; namely, working in the warehouse, operating forklifts, and inspecting products for quality control. The full job description for the beneficiary was included in detail in the original submission. His duties will be as follows: supervising engineering teams, technicians, and technologists; overseeing the installation, maintenance, calibration and operation of [the petitioning organization's] equipment (polishing, cut-to-length multi-blanking, cut-to-length slitting line); management of material selection and process preparation; coordination of warehouse arrivals as well as out-going deliveries; ensuring timely deliveries; and management of quality control and human resources. He will also train the engineering and warehouse teams to improve the quality and speed of [the petitioner's] operations.

The petitioner also submitted an organizational chart. The chart portrays the beneficiary as reporting to a branch manager and as supervising a "warehouse team" and a "delivery team."

On March 12, 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 will be primarily those of a function manager.

Upon review, counsel's assertions are not persuasive.

Once again, 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 will be either in an executive or managerial capacity. *Id.*

In this matter, and for generally the same reasons given above, the petitioner's description of the beneficiary's

organization. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

proposed job duties fails to establish that the beneficiary will be employed in a "managerial" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will supervise engineering teams, technicians, and technologists; oversee the installation, maintenance, calibration and operation of equipment; manage material selection and process preparation; coordinate warehouse arrivals and out-going deliveries; ensure timely deliveries; and manage quality control and human resources. However, the petitioner does not explain what, exactly, the beneficiary will do in supervising, overseeing, managing, coordinating, and ensuring. The petitioner does not specifically identify the "engineering teams, technicians, and technologists" or describe what activities the beneficiary will be supervising. Also, the petitioner does not explain what the beneficiary will do in "managing" material selection or in "coordinating" warehouse arrivals. Specifics are clearly an important indication of whether a beneficiary's duties will be 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, *aff'd*, 905 F.2d 41. 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.

Likewise, the duties ascribed to the beneficiary appear to be primarily non-qualifying first-line supervisory tasks which will not rise to the level of being managerial in nature. As the petitioner has failed to establish that any of his subordinate employees is a supervisory, managerial, or professional worker (*see infra*), the supervisory functions ascribed to the beneficiary are non-qualifying duties. As the petitioner has not established how much time the beneficiary will devote to these non-qualifying tasks, it has not been established that he will be "primarily" employed as a manager. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Although the director specifically requested that the petitioner submit a breakdown of both the beneficiary's and his subordinate employees' duties on a weekly basis, the petitioner failed to submit this evidence and, thus, has failed to establish that the beneficiary will be primarily employed as a manager. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner 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 indicated above, the beneficiary will allegedly supervise "warehouse employees, forklift operators, and quality control inspectors." However, these employees are not described as having supervisory or managerial responsibilities. To the contrary, these employees are vaguely described as performing warehousing related tasks. In view of the above, it appears that the beneficiary will be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. 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. Moreover, as the petitioner failed to establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

