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U.S. Citizenship
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FILE: WAC 03 231 51335 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2010

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general 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, a California corporation, operates a restaurant. It claims to be a subsidiary of [REDACTED], located in China. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary is employed in both a managerial capacity and an executive capacity and that the petitioner has satisfied every element of the statutory definitions at section 101(a)(44)(A) and (B) of the Act. Counsel submits a brief and additional evidence in support of the appeal.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 filed the Form I-129, Petition for a Nonimmigrant Worker, on August 8, 2003. The petitioner indicated on Form I-129 that it has 20 employees. In a letter dated July 30, 2003, the petitioner described the beneficiary's duties as follows:

As the General Manager, he is responsible for setting up and developing the operations of our company. He also assist[s] the Board in establishing company plans and goals, and implementing these goals and plans. He also oversees the overall financial, marketing, personnel, and development matters of the company, and supervises the corresponding functional unit managers once they are established. [The beneficiary] also makes regular progress reports to the Board and oversees the day-to-day operation of the company and its restaurant.

Due to business depression, [the beneficiary] has innovated upon our restaurant from last year. And he brought forward many new projects. Now our company is taking into account [the beneficiary's] one project, that is, opening a new office which relates with commerce and transaction.

The petitioner stated that it began the operation of a Chinese dim sum and seafood restaurant in December 2001 and intends to organize business tours from mainland China to the San Francisco area. The petitioner did not submit the supporting evidence required pursuant to 8 C.F.R. § 214.2(l)(14)(ii) at the time the petition was filed.

Accordingly, the director issued a request for additional evidence (RFE) on October 17, 2003. The director instructed the petitioner to submit, *inter alia*, the following evidence pertaining to the beneficiary's U.S. employment: (1) a more detailed description of the beneficiary's duties, including the percentage of time spent performing each specific duty; (2) a detailed organizational chart for the U.S. company, including names, job titles, job duties, salaries/wages, source of remuneration, and immigration status for all employees under the beneficiary's supervision; (3) copies of the petitioner's California Forms DE-6, Quarterly Wage Reports, for the last two quarters; and (4) copies of the petitioner's payroll summary, IRS Forms W-2 and W-3, evidencing wages paid to employees.

In response to the RFE, the petitioner submitted a letter dated December 26, 2003 from [REDACTED] Chairman of the foreign entity. [REDACTED] described the beneficiary's duties in the United States as the following:

[The beneficiary's] duties in the United States were to oversee the overall financial, marketing, personnel, and development strategy of [the petitioning company]. He made regular progress reports to the parent company of the subsidiary's operation; he also supervised the day to day operations of the Bamboo Garden Restaurant. [The beneficiary] has also been intimately involved in planning the expansion of the subsidiary's business activities in the United States. The main focus of this expansion is the establishment of a business tour business for mainland Chinese business people and the establishment of a[n] antique and art goods business. Because of the SARS crises last year and the general business downturn, the parent company has made a decision to put a temporary hold on the business tour business. However, the expansion into the antique and art goods business is moving forward. Space has been leased at 430 Grant Avenue, San Francisco, California for a retail store which is scheduled to open in June, 2004. The parent company needs [the beneficiary] to oversee these expansion activities as well as supervise the day-to-day operations of the restaurant business.

The petitioner submitted an employee list and organizational chart for the U.S. company. The employee list identified a total of 27 workers, including the beneficiary as general manager, a manager, a kitchen manager, a dim sum manager, a food carrier supervisor, a purchaser, a bookkeeper, a cashier, three servers, two busboys, four food carriers, four kitchen staff, three dim sum division staff, and three dishwashers.

The organizational chart identifies the beneficiary as both president and restaurant general manager, supervising the manager, the dim sum manager, a kitchen manager, the food carrier supervisor, a purchaser, a

cashier, a bookkeeper and three dishwashers. The chart also shows two to three vacant positions in the "travel services and business" department.

The petitioner provided copies of its California Forms DE-6 for the last three quarters of 2003. The petitioner reported 17 employees for the month of August 2003, the month in which the petition was filed, and 23 employees for the month of September 2003. Only 19 names appear on the form, and of these, 12 names also appear on the employee list, including the beneficiary, the bookkeeper, a busboy, two kitchen staff, the kitchen manager, a server, the dim sum manager, one dim sum staff, two dishwashers and the food carrier supervisor. During the fourth quarter of 2003, the petitioner reported 19 employees in October, 21 employees in November and 25 employees in December. However, only 20 names appear on the form, including 19 employees that are also included on the employee list.

The director denied the petition on February 19, 2004, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner described the beneficiary's duties in only broad and general terms and therefore failed to establish his actual day-to-day duties could be classified as managerial or executive in nature. The director found insufficient evidence to establish that the beneficiary would not be engaged in the routine operation of the petitioner's business.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary is employed primarily in a capacity that is both executive and managerial, and that a majority of his activities do not relate to the day-to-day operations of the business. In support of the appeal, the petitioner submits a new organizational chart for the petitioning company, and an expanded description of the beneficiary's duties.

The information submitted on appeal indicates that the U.S. company employs a staff of 21 employees and that the beneficiary directly supervises a floor manager, two chef supervisors, a finance employee, a buyer, and a store manager. The petitioner states that the floor manager supervises a waiter, waitress, food carrier and cashier, the store manager oversees a storage employee, and the chef supervisors oversee a total of eight cooks and a dishwasher. The AAO notes that the finance employee was previously identified as holding the position of purchaser and the store manager was previously identified as a cashier on the employee list.

The petitioner describes the beneficiary's "daily schedule" as follows:

1. 5% of the time meeting with department heads to review daily assignments.
2. 10% of the time to review the daily income and expenditure report to analyze daily operation
3. 10% of the time to inspect readiness of each department for business and on-going operation
4. 30% of the time to give personalized welcome to regular customers

5. 10% of the time spent in office to review communication documents and advertisement
6. 5% of the time to meet with department heads and managers to review the end-of-the-day operation
7. 30% of the time research for investment opportunities.

The petitioner also provides an hour-by-hour breakdown of the beneficiary's daily responsibilities. As the description is part of the record, it will not be repeated here.

Counsel for the petitioner asserts that the beneficiary acts in a managerial capacity because he manages the entire organization, supervises and controls the work of other supervisory, professional or managerial employees, has the authority to recruit, hire and fire mid-level employees, and exercises discretion over the day-to-day operations of the company. Counsel emphasizes that the beneficiary "has run a well-structured organization of twenty employees on two levels of staffing," and has not been functioning as a first-line supervisor.

Furthermore, counsel indicates that the beneficiary functions as an executive because he directs the management of the organization, sets policy for staff, makes all critical decisions, is in charge of investment strategy for the U.S. organization, exercises wide latitude in decision-making, and receives only general supervision from higher-level executives.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(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 definitions of executive and managerial capacity each 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). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's business as its general manager, the totality of the evidence submitted is insufficient to establish that the beneficiary's actual duties will be primarily managerial or executive in nature.

As noted by the director, the position descriptions submitted prior to adjudication of the petition were overly general and failed to identify the specific duties the beneficiary would perform on a day-to-day basis that would qualify as managerial or executive in nature. For example, the petitioner's initial description of the

beneficiary's position, which indicated that the beneficiary is responsible for "setting up and developing the operations" of the company, "establishing company plans and goals," overseeing the day-to-day operations of the company," and overseeing "financial, marketing, personnel and development matters," failed to identify any specific tasks performed by the beneficiary. While these broad responsibilities suggest that the beneficiary has general oversight authority over the business, such statements provide little insight into what the beneficiary does during a typical workweek. 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).

Accordingly, the director reasonably requested a detailed description of the beneficiary's duties, including a list of specific tasks and the percentage of time he allocates to each duty. The job description submitted in response to this explicit request was nearly identical to the initial description, which the director had already reviewed and found to be inadequate to establish eligibility. The petitioner added that the beneficiary has been involved in planning the expansion of the business to include travel and art/antique sales, but failed to describe in any detail the beneficiary's responsibilities with respect to the petitioner's expansion plans, or to provide any supporting evidence to corroborate its claim that such expansion is imminent. The petitioner also failed to provide the requested detailed breakdown of how the beneficiary allocates his time among specific duties. 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). Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Based on the petitioner's failure to provide the requested detailed description of the beneficiary's duties, the director properly denied the petition. The beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadcast business responsibilities.

The petitioner now offers a more detailed description of the beneficiary's duties on appeal, and includes information regarding how the beneficiary's duties are allocated among various tasks. 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.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Regardless, the petitioner indicates that the beneficiary devotes 30 percent of his time to greeting customers in the petitioner's restaurant and 30 percent of his time researching and following up on potential expansion or investment opportunities. The petitioner has not established how either of these responsibilities would qualify as managerial or executive in nature. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner's description of the beneficiary's duties cannot be considered in the abstract. When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record. Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The director determined that the beneficiary will not be supervising a staff of supervisory, professional or managerial employees. On appeal, counsel contends that the beneficiary qualifies as a manager, in part, based on his authority for supervising subordinate supervisors such as the floor manager, storage manager, and two chef supervisors. Counsel emphasizes that the company employs 21 employees and that the two tiers of subordinate staff perform the day-to-day operational tasks of the restaurant and all first-line supervisory tasks.

Counsel's claim is unpersuasive for two reasons. First, while the petitioner has provided two employee lists and organizational charts, the evidence of record does not corroborate the petitioner's claims regarding the staffing of the company. 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). Therefore, the AAO will look to the staffing of the company as of August 2003. The petitioner claimed to employ 20 employees at the time of filing. According to the petitioner's Form DE-6 for the third quarter of 2003, the petitioner employed 17 workers in August 2003. As noted above, the evidence appears to corroborate the employment of the beneficiary, a bookkeeper, a kitchen manager and two kitchen staff, a dim sum manager and one dim sum staff, two dishwashers, a food carrier supervisor, one server, one busboy, and perhaps five additional workers whose job titles have not been identified. The petitioner submitted an

employee list with 27 employees at the end of 2003, but only listed 20 employees on its quarterly report for the last quarter of that year. The petitioner claimed to employ a total of 23 workers in September 2003, but listed only 19 names on its quarterly report for the third quarter of that year. 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). Given these discrepancies, the AAO must question the accuracy of the information provided on the quarterly wage reports for 2003, and cannot determine with any degree of confidence who was actually working for the company at the time of filing.

Second, while three of the employees who can be tentatively confirmed have the title "manager" or "supervisor," the petitioner failed to provide the requested job descriptions for the beneficiary's subordinate staff. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Again, 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). Absent a description of the actual duties performed by the claimed subordinate supervisors and managers, the AAO cannot determine whether they are actually supervising subordinate staff or whether they are performing the routine duties of the departments they are claimed to manage or supervise. The record does not support a finding that the petitioner actually employed the claimed number of subordinate kitchen or floor staff, which raises questions regarding the nature of the duties performed by these department managers.

Given these deficiencies, the petitioner has not established that the beneficiary is supervising and controlling a subordinate staff of supervisors or managers, and the petitioner does not claim that the beneficiary's subordinates are professionals. Accordingly, while the beneficiary has the authority to hire and fire subordinate personnel, the petitioner has not established that he serves primarily as a personnel manager.

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-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.* While the beneficiary's job description borrows liberally from the statutory definition of "executive capacity," the facts of this case do not support a finding that his actual duties are primarily focused on the broad policies of the U.S. company.

Overall, while the AAO does not doubt that the beneficiary has authority to make decisions with respect to the management of the United States entity, the record does not support a conclusion that his duties are primarily managerial or executive in nature. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The AAO also acknowledges the petitioner's claim that the U.S. company is planning an expansion of its business activities. However, as noted above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

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.