

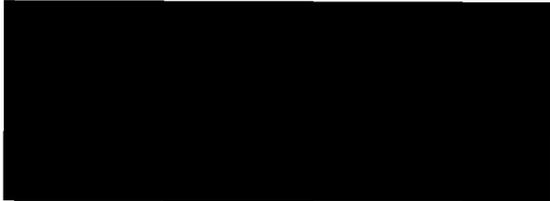
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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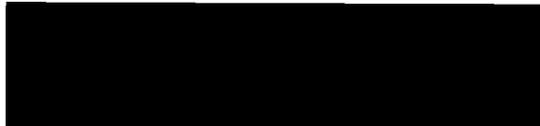


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FILE: WAC 09 046 50232 Office: CALIFORNIA SERVICE CENTER Date:

**MAR 12 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).

Jerry 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 Hong Kong corporation, claims to be the parent company of the beneficiary's U.S. employer, an Illinois corporation that operates as a freight forwarding company. The beneficiary was initially granted L-1A classification for a one-year period in order to open a new office in the United States, and the petitioner now seeks to extend his status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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, the petitioner seeks to clarify the beneficiary's duties as well as the duties performed by his subordinates in the United States. The petitioner asserts that the beneficiary spends 100 percent of his time in a managerial and supervisory role.

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 December 8, 2008. The petitioner stated on Form I-129 that the U.S. subsidiary has four employees. In a letter dated November 17, 2008, the petitioner stated that the U.S. office was established "to provide prompt and excellent customer service to [the Hong Kong petitioner's] overseas clients." The petitioner further stated:

With a fully equipped U.S. base, [the petitioner] will have the capability of contacting overseas shippers to notify them immediately when their shipments arrive in the U.S. and when shipments are forwarded to the consignees. The U.S. office will also have the ability to provide overseas shippers with prompt and detailed responses to inquiries concerning U.S. side operations. In regards to payment processing, the U.S. office will be able to transfer payment expeditiously from consignees back to the originating ports overseas, thereby enabling [the petitioner's] ongoing operations.

The petitioner described the beneficiary's duties as general manager of the U.S. subsidiary as the following:

[H]e has been responsible for maintaining smooth and efficient communications with [the petitioner's] Hong Kong and China offices regarding all of their shipments to the U.S. He has discretionary authority over all operations, including day-to-day business administration;

coordination of shipments received from Hong Kong and China; customer service including phone inquiries and informing consignees of shipment arrivals; supervision, hiring and firing of all employees; preparation of business forecasts; account management; and the development of sales and marketing strategies.

The petitioner submitted copies of five IRS Forms W-4, Employee's Withholding Allowance Certificate, but did not provide evidence of wages paid to employees during the first year of operation.

The director issued a request for additional evidence (RFE) on December 12, 2008, in which she requested, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties, including the percentage of time spent in each of the listed duties; (2) the total number of employees working in the U.S. office; (3) an organizational chart for the U.S. company which identifies the beneficiary's subordinates by name and job title; (4) a brief description of job duties, educational level, annual salaries and wages, immigration status and source of remuneration for all employees under the beneficiary's supervision; and (5) copies of the petitioner's state quarterly wage report for the last four quarters.

In response, the petitioner submitted the following description of the beneficiary's position:

Mission:

- Supervise U.S. subsidiary to ensure all departments maintain efficient & profitably.
- To administrate & manage US subsidiary on Import & Export operations.
- Assist & provide guideline on cargo space booking with Carrier or Co-load Agents.
- To liaise & assist all department head to ensure service level maintain standard.
- Liaise with Overseas offices & Agents on business network development.
- Ensure staffs are properly equipped & provide training as necessary to improve quality of work.
- Performance review for all staffs.
- Prepare & organize statistic reports on cargo activities to Parent Company. . .
- Recommendation & suggestion on Company development to Parent Company. . .
- Achieving Company's objective & company goal, and report to Parent Company . . .

<u>Ongoing Tasks and Duties</u>	<u>% of Time Spent</u>
Establish contact with already established US clients base	10%
Market development: Check media, like Internet, Telephone Book, Newspapers, to obtain client information and make contacts.	25%
Providing training to staffs	5%
Supervise daily cargo operations in Import & Export	35%
Maintain computer system	2%

Approve accounting voucher and arrange payment	3%
Liaise with oversea offices & agents on business development.	5%
Established relationships with Airlines, Ocean Liners, Truckers and Customs Brokers to gain the most economical costs.	5%
Chasing the outstanding accounts receivable payment.	5%
Communicate with Hong Kong Headquarters and activities reporting.	5%

The U.S. company's latest Illinois Form UI-3/40, Employer's Contribution and Wage Report, for the third quarter of 2008, indicated that the company employed five workers, including the beneficiary, as of September 30, 2008. According to the U.S. company's organizational chart, the beneficiary supervises a sales manager, an operations manager, and an accounting manager. The chart indicates that the operations manager supervises one subordinate employee, an operations clerk.

The petitioner also submitted brief job descriptions, educational levels and salaries for the subordinate staff. The job descriptions were as follows:

Operations Manager (Full Time) – Supervise daily cargo operations in import and export

Sales Manager (Full Time) – Maintain update selling rate to clients, and market development.

Accounting Manager (Part Time) – Account receivable and payable, budget control, profit & loss report.

Operation Clerk (Full Time) – Arrange daily cargo receiving & delivery.

The director denied the petition on January 26, 2009, 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's description of the beneficiary's duties fails to establish that he performs primarily managerial tasks, and that several of the listed duties demonstrate that he actually performs the tasks necessary to provide the services of the U.S. company. The director further found that the petitioner had failed to provide the requested job descriptions, educational levels and annual salaries for the beneficiary's subordinates.<sup>1</sup> The director noted that the fact that three of the beneficiary's subordinates

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<sup>1</sup> As noted above, this evidence was in fact provided, but was evidently overlooked by the director. This evidence has been considered by the AAO in reaching its determination in this matter. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147,



The petitioner indicates that the beneficiary "exercises discretion over day to day operations of the activity of the sales; operations and accounting departments" and "may dedicate a fluctuating amount of time daily on the operations of each department depending on the need."

The petitioner asserts that the job description demonstrates unequivocally that the beneficiary's managerial and supervisory duties require 53% of his time, while the remaining duties, such as maintaining good relationships with clients and suppliers, are those that are normally only performed by a top manager.

In support of the appeal, the petitioner submits evidence that the petitioner's sales manager was awarded an undergraduate degree from the University of Illinois at Chicago in January 2009, and evidence that the accounting manager has a bachelor's degree in business administration.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will 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(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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while the beneficiary exercises discretion over the U.S. office as its general manager, the AAO concurs with the director that the petitioner has not established that his actual duties will be primarily managerial or executive in nature.

As noted by the director, several of the beneficiary's job duties have not been shown to be managerial or executive in nature. These duties including establishing contact with the company's U.S. client-base, checking media resources to obtain client information and make contacts, maintaining computer systems, approving accounting vouchers and arranging payments, training staff in logistics and customs regulations, and chasing outstanding accounts receivable payments. These duties alone account for 50 percent of the beneficiary's time, plus the petitioner indicates that the beneficiary spends a "fluctuating amount of time daily on the operations of each department depending on the need." The petitioner provides no indication as to how frequently the beneficiary is required to directly perform the day-to-day duties of the accounting, sales or operations department in addition to his regular 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the AAO notes that the position description submitted at the time of filing indicated that the beneficiary is directly responsible for non-managerial duties such as "coordination of shipments received from Hong Kong and China"; and "customer service including phone inquiries and informing consignees of shipment arrivals"; as well as potentially non-managerial duties such as "account management"; and "preparation of business forecasts." None of these duties were included in the position description submitted in response to the RFE. 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 materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. 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. 248, 249 (Reg. Comm. 1978). Absent some explanation from the petitioner regarding the omission of these duties from its subsequent job description, the AAO will assume that the beneficiary's regular duties as of the date of filing did in fact include coordinating shipments from Hong Kong and China, handling telephone inquiries, and making shipment notifications, as well as day-to-day account management tasks.

The AAO acknowledges the petitioner's claim on appeal that some of the duties deemed by the director to be non-qualifying are actually managerial in nature. For example, the petitioner states that the accounting manager prepares all invoices and orders while the beneficiary has sole authority to "approve accounting vouchers and payment of expenses" and "chase outstanding payments." The petitioner acknowledges that the petitioner's invoices indicate that each transaction was "handled by: [the beneficiary]," but states that this notation merely "affirms the direct control by [the beneficiary] on the Sales staff." However, the AAO is not persuaded that the "accounting manager," who is paid only \$100 per month, is actually available on a daily basis to perform all invoicing, bookkeeping, record keeping, and other financial functions of the company. Rather, it appears that this employee likely works, at most, for 10 hours on a monthly basis.

The petitioner further claims that the beneficiary's responsibilities for maintaining good relationships with clients and suppliers and exploring the market through research of media sources are duties that can only be performed by a high-ranked manager. However, the petitioner has not adequately explained how these duties qualify as managerial under the statutory definition at section 101(a)(44)(A) of the Act. While the beneficiary does supervise one subordinate sales employee, the sales manager's duties are poorly articulated and fail to clearly define how the company's day-to-day sales and marketing duties are distributed between the beneficiary and his subordinate. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Overall, the position descriptions submitted fail to establish that the beneficiary is primarily engaged in performing managerial or executive tasks.

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(I)(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(I)(1)(ii)(B)(3).

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Here, while three of the beneficiary's subordinates have managerial job titles, only one of them, the operations manager, is claimed to actually supervise a subordinate employee. In order to be a supervisor, the employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. *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)). Here, the petitioner has not shown that the beneficiary is primarily engaged in the supervision of a subordinate staff of managers and supervisors. Rather, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating their respective departments within the petitioner's four-person freight-forwarding business.

Furthermore, while two of the petitioner's employees, the sales manager and the part-time accountant, possess undergraduate degrees, the evidence of record is insufficient to establish that they occupy professional positions. 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree in an unidentified liberal arts field is actually necessary, for example, to perform the duties of the sales manager.

Based on the foregoing, the petitioner has not established that the beneficiary qualifies for the benefit sought as a personnel manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a 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 claimed that the beneficiary will manage an essential function of the organization, nor does the record support an affirmative determination that the beneficiary will perform primarily managerial duties. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner has not met that burden.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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 primarily managerial or executive position. Although the petitioner mentions on appeal that it is in the process of hiring additional staff, 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 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.