

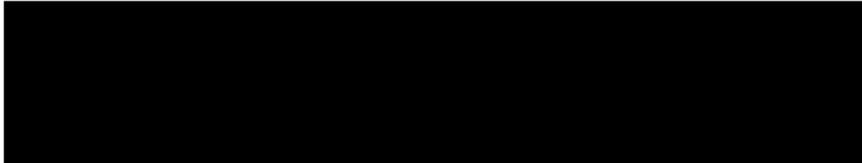
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

DATE: JUL 14 2011

Office: CALIFORNIA SERVICE CENTER

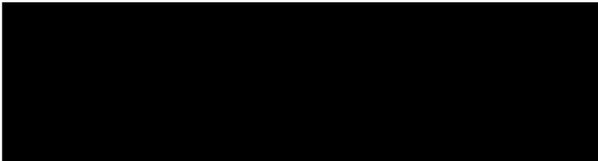
FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 chief operating officer 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, is engaged in engineering design and manufacturing services. It states that it is the parent company of [REDACTED]. The petitioner seeks to employ the beneficiary in the position of Electrical Manufacturing Manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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. On appeal, counsel asserts that the evidence clearly shows that the beneficiary will be employed in a managerial capacity in the United States based on his supervision of a subordinate staff of professional personnel and management of an essential function of the petitioning company. Counsel submits a brief and additional documentary 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a managerial capacity. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

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.

In a letter dated November 6, 2008, the petitioner stated that the beneficiary will be employed in the position of Electrical Manufacturing Manager performing the following duties:

[The beneficiary] will be responsible for managing an engineering team of up to six engineers; managing manufacturing projects and ensuring timely completion; reviewing and assigning projects to team members; reviewing final design and providing recommendations; providing thought leadership; identifying and improving performance of existing systems and reducing manufacturing costs; coordinating system integration, testing and field installation of next generation LCD inspection tools; and implementing cross training program for team members.

The petitioner indicated that the beneficiary would be in the United States periodically and would remain on the foreign entity's payroll. The petitioner submitted an organizational chart depicting the beneficiary's position as Electrical Manufacturing Manager, based in Vietnam, and overseeing three manufacturing

engineers in Vietnam. The chart indicates that the beneficiary would report to the U.S. company's Director, Manufacturing.

The director issued a request for additional evidence ("RFE") on November 20, 2008. The director requested that the petitioner provide, *inter alia*: (1) the total number of employees working at the U.S. location where the beneficiary will be employed; (2) an organizational chart for the U.S. entity which clearly identifies all employees under the beneficiary's supervision by name and job title, and includes a brief description of their job duties, educational level, annual salaries/wages, immigration status and source of remuneration; (3) a more detailed description of the beneficiary's proposed duties in the United States including the percentage of time he will allocated to each specific tasks; and (4) copies of the petitioner's state quarterly wage reports for the last four quarters.

In a response dated December 2, 2008, counsel stated that the beneficiary's duties in the United States will be as follows:

- Managing an engineering team of up to six engineers and ensuring timely completion of manufacturing projects (20%)
- Reviewing and assigning projects to team members (20%)
- Reviewing final design and providing recommendations (25%)
- Providing thought leadership; identifying and improving performance of existing systems and reducing manufacturing costs (20%)
- Coordinating system integration, testing and field installation of next generation LCD inspection tools (10%)
- Implementing cross training program for team members (5%)

Counsel stated that the beneficiary will supervise two "manufacturing engineer consultants" [REDACTED] and [REDACTED] and two manufacturing engineers who have yet to be hired. Counsel indicated that [REDACTED] and [REDACTED] are responsible for "design, implementation" and earn wages of \$50 to \$100 per hour.

Counsel indicated that the petitioning company currently has 13 employees, and, due to its "rapid expansion" needs to hire and retain qualified engineers and mid-level managers such as the position to be filled by the beneficiary.

The petitioner submitted a revised organizational chart indicating that the beneficiary will supervise [REDACTED] and two manufacturing engineers who have not yet been hired. The petitioner provided the requested copies of its state quarterly wage reports, which indicate that the petitioner had seven payroll employees as of October 2008, one month prior to the filing of the petition. [REDACTED] and [REDACTED] were not among the employees reported on the wage reports.

The director denied the petition on December 17, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director noted that half of the beneficiary's proposed subordinates had yet to be hired and emphasized that the future hiring of additional employees has no bearing on the beneficiary's proposed position as a manager as of the date of filing. The director acknowledged the petitioner's claim that it

currently employs [REDACTED], but noted that neither individual was included in the petitioner's quarterly wage reports for 2008.

On appeal, counsel for the petitioner asserts that the beneficiary's primary responsibilities in the United States will be to manage and supervise a team of professionals. Counsel emphasizes that [REDACTED] and [REDACTED] were employed by the petitioner as independent contractors as of the date the petition was filed, and notes that the petitioner "is actively recruiting mechanical design and manufacturing engineers from its subsidiary in Vietnam to fill these positions."

Counsel further asserts that the beneficiary will be managing an essential function based on his responsibilities for the petitioner. In support of this assertion, counsel reiterates the beneficiary's job duties as described in the petitioner's letter dated November 6, 2008.

In support of the appeal, the petitioner submits copies of IRS Forms 1099, Miscellaneous Income, issued to [REDACTED] and [REDACTED], which shows that they were paid \$5,200 and \$5,500, respectively, as nonemployee compensation. The petitioner also provides a copy of its Contractor Services Agreements with both individuals, both of which are dated November 3, 2008. The agreements indicate that [REDACTED] and [REDACTED] agree to provide services as specified in a "Project Assignment" attached as Exhibit A. The petitioner did not submit copies of this exhibit for either agreement. The AAO notes that [REDACTED] agreement has a termination date of November 12, 2008, while [REDACTED] agreement has a termination date of May 25, 2009.

Finally, counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the statute is not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises. Counsel asserts that the petitioner is in fact rapidly expanding and provides copies of all IRS Forms 1099 issued in 2008, as well as copies of business contracts executed in 2008.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial capacity.

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.*

While the petitioner has provided a list of six general responsibilities to be assigned to the beneficiary and the percentage of time he is expected to allocate to each, the petitioner failed to provide the detailed description of the position requested by the director in the RFE and required by regulation. Duties such as "managing an engineering team," "providing thought leadership," "reviewing projects," and "ensuring timely completion of manufacturing projects," provide little insight into the nature of the specific tasks the beneficiary will perform on a day-to-day basis, such that they could be classified as managerial in nature. Absent additional details regarding the nature of the beneficiary's work, the AAO cannot determine how such tasks as "reviewing final design and providing recommendations," "coordinating system integration, testing and field installation," and "identifying and improving performance of existing products," duties which are to require approximately half

of the beneficiary's time, rise to the level of managerial capacity as contemplated in the statutory definition. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's actual job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Beyond the required description of the beneficiary's job duties, USCIS reviews the totality of the record, including any subordinate employees and their duties, 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 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 petitioner has consistently indicated that the beneficiary will be "managing an engineering team of up to six engineers." The petitioner's initial organizational chart identified the beneficiary as managing three Vietnam-based engineers. In response to the RFE, the petitioner indicated that the beneficiary would supervise two consultants and two other U.S.-based engineers who are "to be determined." While the petitioner indicates that it is actively recruiting for its U.S. operations, 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 "engineering team" to be managed by the beneficiary did not exist within the U.S. company at the time the petition was filed. While the petitioner has provided evidence on appeal to verify that [REDACTED] and [REDACTED] were hired as contractors, the petitioner has not provided any information regarding their job duties, nor has it explained why these individuals were not identified as the beneficiary's proposed subordinates at the time the petition was filed. Further, the term of [REDACTED] contract with the U.S. company was only 10 days and the agreement expired two days after the petition was filed. Regardless, the petitioner has not established that the beneficiary would primarily be supervising these two consultants, or that they would relieve the beneficiary from performing non-managerial duties associated with his project assignments.

Finally, the AAO notes that the petitioner's description of the beneficiary's duties does not specify that he will have the authority to hire and fire employees, or recommend these and other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). 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. 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)).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed by the U.S. entity primarily as a "personnel manager."

On appeal, counsel asserts that the beneficiary will manage an essential function of the petitioning company. 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 position description that identifies the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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.

Although counsel stated that the beneficiary will manage an essential function, neither counsel nor the petitioner has identified the function to be managed with specificity or clearly established how much of the beneficiary's time would be devoted to management duties associated with the function. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, in the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The petitioner suggests that the non-managerial aspects of its manufacturing engineering projects would be performed by the above-referenced consultants and engineers who have yet to be hired. Therefore, it is unclear who, other than the beneficiary, would perform non-managerial duties associated with the beneficiary's area of responsibility. Collectively, the "to be determined" status of the beneficiary's proposed subordinate staff raises questions as to whether there is a managerial position immediately available to him, or whether he will also be performing non-managerial duties associated with his assigned projects for the immediate future. 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; see also *Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). 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. The petitioner has not sustained this burden.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the statute is not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the petitioner's failure to establish that the beneficiary will be primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5. The significant deficiencies in the petitioner's evidence have been discussed above and include its failure to provide a detailed description of the beneficiary's duties, its failure to identify with specificity the function the beneficiary would manage, the failure to document the existence of the majority of the beneficiary's subordinate staff as of the date of filing, and the failure to provide the requested position descriptions for the beneficiary's claimed subordinates.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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.