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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**



B7

DATE: **NOV -8 2011** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

Thank you,

A handwritten signature in black ink that reads "Perry Rhew".

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 AAO will sustain the appeal and approve the petition.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner was formed as a limited partnership under the laws of the State of Delaware in 2009, and is engaged in the design and manufacture of industrial machinery for the tire industry. It claims to be an affiliate of RMS Equipment Company, located in Ontario, Canada. The petitioner is seeking L-1A status for the beneficiary as the Vice President, Sales & Marketing, for an initial 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 of record is sufficient to satisfy the petitioner's burden of proof and establishes that the beneficiary is, and will be, employed in the United States in a managerial capacity.

I. The Law

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.

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.

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). 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(1)(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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

II. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 14, 2011. The petitioner established that it is a member of a group of affiliated U.S., Canadian, and Chinese companies that design and manufacture state-of-the-art tire and manufacturing extrusion equipment. Specifically, the petitioner is part of the Pettibone Tire Equipment Group, which in turn is a member of [REDACTED]. [REDACTED] is composed of more than 45 companies, generating revenues of \$2 billion and employing more than 8,000 employees.

Based in Akron, Ohio, the petitioning company serves as the corporate headquarters for the RMS group of companies. The petitioner employs approximately 35 people in the United States and Canada and achieved consolidated gross sales in excess of \$20 million in 2010. The Ohio facility consists of a 6,000 square foot administrative center and a 20,000 square foot design and assembly facility. The actual manufacturing facility is located in China and employs approximately 90 people.

The petitioner stated that it intends to move the RMS group sales and marketing function from the current location in Canada to the petitioner's office in Akron, Ohio. The petitioner provided a list of duties related to the beneficiary's current position as Vice President, Sales & Marketing for the foreign entity. The petitioner described the proposed managerial position in the United States as follows:

His duties will be similar to the duties outlined above, however, he will be expected to further develop and expand the sales and marketing department. [REDACTED] will have total responsibility for the sales and marketing function within RMS U.S., as well as directing the management of these activities globally. He will manage the sales and marketing area of the business, supervise the sales team, and hire and discipline direct reports. Initially, he will continue to supervise the two positions he currently supervises in Canada, the Director TBM Sales and Director Extruder Sales, however, as indicated above, plans are already underway to recruit, hire, and train two additional sales positions for the U.S. operation. [REDACTED] will have full decision making responsibility for the day-to-day operations of the sales functions.

The petitioner provided a lengthy description of the beneficiary's duties, noting that he will "develop sales strategies and budgets, with the goal of enhancing and expanding customer relations through the sales group." The petitioner indicated that the beneficiary has authority to hire and fire all staff in the branch. The beneficiary exercises discretion over the day-to-day sales and budgeting operations of the branch. In addition, the petitioner stated that the beneficiary is responsible for establishing the "goals, policies, objectives and direction of the sales and marketing function to ensure that the company's objectives are achieved." The beneficiary will also be responsible for directing the "implementation of a marketing strategy for the business to achieve the company's key objectives of sustainable profit growth, as well as increasing the customer base on a global basis."

Furthermore, the petitioner explained that it was transferring the sales and marketing function to the U.S. office with the beneficiary as the head of that office. The beneficiary will be responsible for recruiting, hiring, and training additional staff. He will "exercise the highest level of decision making authority, reporting directly to the President of RMS US and receive only general supervision from [REDACTED], the ultimate parent company. He will continue to serve as an integral part of the decision making team by continuing to work "directly with all engineers and purchasing agents [to] determine the customer's needs for field service" and work closely with the finance group. He will work along with the President and Vice President, Finance to make recommendations for the "direction of the business, including developing a strategy and setting out any department and key individual goals to meet the strategy."

Attached to the petition was a detailed job description including percentage of time spent performing each duty. The petitioner listed 11 job duties, further broken down into a list of tasks related to each overall duty. Specifically, the beneficiary is to spend 17 percent of his time "[m]anaging the effort of the sales team." This task included duties such as establishing annual budgets by machinery type and customer; forecasting order intake; forecasting sales by month; negotiating major contracts up to \$1 million; setting and managing sales targets; and evaluating business needs and market conditions to establish a pricing policy."

An additional 16 percent of the beneficiary's time is to be spent "[o]verseeing implementation of a marketing strategy." This task included duties such as developing a marketing strategy with annual revenue targets for a rolling five year period by machinery type; evaluating product development required to achieve annual revenue targets; developing and overseeing implementation of geographical and customer based marketing strategy; hiring, mentoring, disciplining, or firing the sales group; and setting the budget for marketing activities.

Other duties listed by the petitioner included: managing and supporting the activities of the international agents (12%); managing contact with key customers (8%); managing relationships with major associated companies (4%); managing and coordinating the activities of direct reports (12%); managing internal sales reporting (10%); evaluating activities of competitors and providing feedback on developments (3%); evaluating and reporting on the company's position in the market place (3%); supporting sales operations of sister companies (3%); and contributing to the petitioner's overall strategy as a key member of the senior management team (12%). The petitioner listed a total of 57 additional tasks associated with each function.

The director issued a request for additional evidence (RFE) on March 8, 2011. The director requested that the petitioner provide, *inter alia*: (1) a more detailed description of the beneficiary's job duties in the United States, including the percentage of time to be spent in each of the listed duties; (2) a detailed organizational chart for the U.S. company that clearly identifies the beneficiary's position and all employees working under his supervision by name and job title; and (3) copies of the U.S. company's payroll summary, IRS Form W-2's and W-3's, evidencing wages paid to all U.S. employees.

In response, the petitioner submitted a letter from [REDACTED], President, providing a detailed overview of the position and how the beneficiary will be functioning in a managerial capacity. The letter provides the following response to whether the beneficiary is managing the claimed sales and marketing function:

██████████ will manage both a sales team and the function responsible for generating RMS's revenue. As Vice President, Sales & Marketing, ██████████ will lead and direct the business area of Sales & Marketing. As such, he is managing a major function of the business. In 2010, RMS's revenues grew from \$15 Million to \$20 Million, largely due to ██████████'s efforts in directing the sales and marketing of the company.

██████████ explains further that:

[S]ales and marketing is a key, essential component because without effective sales and marketing, the RMS Group's products cannot be brought to market, cannot compete with competitor's products and cannot generate revenues for the company. He manages this function by developing strategic plans, setting goals and assigning tasks to and supervising the efforts of the Sales & Marketing team members.

The petitioner submitted the same detailed list of job duties with percentage breakdown submitted with the initial filing, but provided more detail regarding the beneficiary's actual tasks, objectives, and strategic goals.

The petitioner also provided the requested organizational chart for the office at which the beneficiary will work. According to the chart, the beneficiary reports directly to the President. There are four positions reporting directly to the beneficiary: Director, Extruder Sales; Director, TBM Sales; and two open positions for a Sales/Service role. The positions of Director, Extruder Sales and Director, TBM Sales are located at the Canadian office. The petitioner provided a second organization chart showing only the two Sales/Services role for the U.S. office.

The petitioner provided position descriptions for Director, Extruder Sales and Director, TBM Sales. The petitioner also provided the job descriptions for the two Sales Manager positions at the U.S. office and the Sales Manager-China position. The petitioner stated that both of these positions will be hired and supervised by the beneficiary. The petitioner submitted the IRS Forms W-2 and W-3 reflecting the wages paid to the U.S. employees. The record shows that the company paid 13 full-time employees in 2010. None of the employees listed on the 2010 W-3s will be reporting to the beneficiary.

The director denied the petition on March 18, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the record does not demonstrate that the beneficiary will be managing or directing, rather than performing, the essential marketing functions of the company. Of the four employees listed on the organizational chart, the director found that the two currently vacant positions had no bearing on the proposed duties as the petitioner must establish eligibility at the time of filing. Furthermore, the director declined to consider the two employees located in Canada as managed by the beneficiary because the beneficiary is to be employed in the United States. Therefore, the director concluded that there were no employees to relieve the beneficiary of non-qualifying duties in the United States.

Additionally, the director determined that the beneficiary's duties are primarily comprised of marketing tasks. Citing to *Matter of Church Scientology*, the director stated that "[m]arketing duties, by definition, qualify as performing the tasks necessary to provide a service or produce a product. An employee who primarily

performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity." See 19 I&N Dec. at 604.

On appeal, counsel asserts that the evidence establishes that the beneficiary's role is in a managerial capacity pursuant to section 101(a)(44)(A) of the Act, in that he manages an essential function of the organization; will be functioning at a senior level; does not spend a majority of his time on day-to-day functions; and his involvement in marketing does not exclude him from being employed in a managerial or executive capacity.

Counsel also asserts that the beneficiary's involvement in marketing does not exclude him from being considered as employed in a managerial or executive capacity. Counsel argues that the director's only support for the proposition, *Matter of Church Scientology*, "did not hold that involvement in marketing somehow disqualifies an employee from being a 'manager' or 'executive.'" The INS Commissioner held only that in order for a beneficiary to qualify as a manager or executive the position "must involve significant authority over generalized policy of an organization or major subdivision of an organization," and that the duties "must be primarily at the managerial or executive level." Counsel asserts that the beneficiary meets both of the criteria.

III. Analysis

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. Upon review, counsel's assertions are persuasive. The petitioner has submitted sufficient evidence to establish that the beneficiary will more likely than not be employed 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). Contrary to the director's observations, the petitioner has provided a comprehensive description of the beneficiary's duties sufficient to establish that his duties are primarily related to the management of the petitioner's sales and marketing function, and not to producing a product, providing a service, or performing other non-managerial functions. The submitted evidence also establishes that the beneficiary supervises and controls the work of subordinate supervisory employees and exercises authority to hire and fire employees under his supervision. See sections 101(a)(44)(A)(ii) and (iii) of the Act.

As a preliminary matter, the AAO does not find persuasive the petitioner's argument that the prospective hiring of new employees should be considered when determining whether there are other employees present to relieve the beneficiary of non-qualifying functions. As detailed in the position description, the task of hiring new employees may be considered a managerial duty "if another employee or other employees are directly supervised," in which case the beneficiary must have "the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization)." Section 101(a)(44)(A) of the Act. The duty of hiring new employees will only be considered relevant on the percentage basis of time required by the petitioner for the beneficiary to perform such duty. With respect to the actual presence of employees to perform the non-qualifying functions, the AAO cannot consider speculative claims that the positions will be filled in the future. As correctly noted by the director, 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'r 1978).

However, the AAO agrees with the petitioner's assertion that the beneficiary's overall management of the sales and marketing divisions, within the context of the petitioner's business organization, can be equated to managing a subdivision, function, or component of the organization. *See* section 101(a)(44)(A)(i) of the Act. Further, the beneficiary does not directly perform the routine sales and marketing functions carried out by the office. Finally, the AAO is satisfied that the beneficiary exercises discretion over the day-to-day operations of the sales and marketing division, as required by section 101(a)(44)(A)(iv) of the Act.

In finding that the proffered position is not managerial in nature, the director refused to consider the beneficiary's subordinate staff located at the Canadian office. The AAO notes that the statutory definition of managerial capacity refers to an assignment within an organization in which the employee manages the organization or an essential function. The term "organization" is defined at section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), as follows:

The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

The statutory definition of an organization would not reasonably include a foreign corporation that is an entity separate and distinct from the petitioning organization. Here, however, the foreign corporation, [REDACTED], is not separate and distinct from the petitioner. The record contains documentary evidence that the petitioner and [REDACTED] are both affiliates owned and controlled by [REDACTED]. Both the petitioner and [REDACTED] are jointly engaged in the design and manufacture of industrial machinery for the tire industry. In 2009 [REDACTED] moved its corporate headquarters to the petitioner's facility in Akron, Ohio. Accordingly, the United States entity and the facility in Canada are permanently associated through ownership. Therefore, the beneficiary's management of the sales team for [REDACTED] on behalf of the petitioner may be considered when determining if the proffered position is in a managerial capacity.

The petitioner has submitted sufficient documentary evidence to establish the existence of the Canadian sales team, that the beneficiary would continue to supervise the sales team in Canada, and that he would have discretionary authority over personnel actions related to the team. Additionally, the job descriptions provided to the Canadian employees are sufficient to establish that the supervised positions are managerial or professional in nature. Accordingly, the AAO concludes that the position offered to the beneficiary in relation to the Canadian team is in a managerial capacity; the director's decision to deny the petition on this basis shall be withdrawn.

Furthermore, the AAO disagrees with the director's conclusion that the beneficiary's job duties – specifically those related to marketing – are inherently operational and not managerial or executive in nature. Contrary to the director's conclusion, the beneficiary's marketing duties will not automatically disqualify him as a manager or executive under the statutory definitions. Rather, further analysis is required to determine if the *specific* marketing duties performed by the beneficiary qualify as executive or managerial under the Act.

The Department of Labor's Occupational Outlook Handbook (OOH), 2010-11 Edition, lists two positions related to marketing. The first is "marketing managers" and the second is "market and survey researchers." According to the OOH, a "market and survey researcher" gathers "information about what people think." They are responsible for "[g]athering statistical data on competitors and examining price, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales." They also "devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences." The position usually requires a bachelor's degree, but a master's degree is usually required for "more technical positions."

By contrast, a marketing manager's duties are described as follows:

With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

Marketing manager positions usually require either a bachelor's or master's degree in business administration with an emphasis on marketing. The positions are usually filled through promotions of experienced staff or related professional personnel.

Contrary to the director's assertions, the AAO finds that the duties associated with the position of "marketing manager" may be considered managerial or executive in nature, if the claim is supported by the record of proceeding. The duties associated with a "market and survey researcher," however, are tasks necessary to produce a product or service and do not qualify as managerial or executive duties. *See Boyang Ltd. v. INS*, 67 F.3d 305 (9th Cir. 1995) (unpublished) (citing to *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988) and finding an employee who primarily performs operational tasks is not a managerial or executive employee).

In the present case, the beneficiary is primarily performing the duties of a "marketing manager" with relation to his management of the marketing function. The petitioner states that the beneficiary will spend 17 percent of his time directing the effort of the sales team. Two out of nine tasks under this duty, however, involved forecasting order intake and forecasting sales by month and rolling 13 month period. While directing the effort of the sales team is managerial, the actual forecasting duties are considered to be the work of a market

and survey researcher and are not qualifying managerial functions. The beneficiary will also spend 16 percent of his time on direct implementation of a marketing strategy. There are seven specific duties listed under this section including developing a marketing strategy; implementing a marketing strategy; evaluating product development; and hiring, mentoring, disciplining, and firing the sales group. All of these duties qualify as managerial. The petitioner will also spend three percent of his time evaluating the activities of competitors and providing feedback. Of the two tasks listed under this duty, researching and monitoring the activities of key competitors for market strategy is considered a non-managerial function. Determining how the information gathered can be used to improve and promote the petitioner's products, however, is a managerial duty.

While the beneficiary will undoubtedly be required to apply his product expertise and perform some higher-level sales, marketing, and administrative tasks, the AAO is persuaded that the majority of the day-to-day, non-managerial tasks required to operate the business are carried out by the beneficiary's subordinates. While the branch office is not large, the record shows that the petitioner's network of offices includes both Canada and China.

IV. Conclusion

As required by section 101(a)(44)(C) of the Act, 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. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the petitioner has established that, at a minimum, the beneficiary primarily manages an essential function of the petitioning organization in addition to an overseas sales team. Given the overall purpose and stage of development of the organization, the petitioner established a reasonable need for a sales and marketing manager at the headquarters location to oversee product sales and marketing for the company as a whole.

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, the petitioner has sustained that burden. Accordingly, the director's decision dated March 18, 2011 is withdrawn and the petition is approved.

ORDER: The appeal is sustained.