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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**

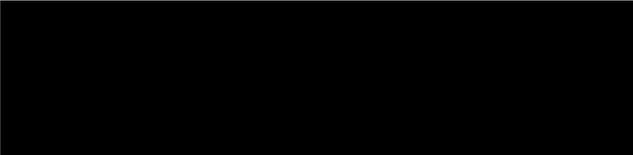


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DATE: NOV 16 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a [REDACTED] corporation, claims that it is engaged in “promoting cultural exchange between U.S. and [REDACTED].” The petitioner states that it is an affiliate of [REDACTED], located in the [REDACTED]. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary to fill the position of chief executive officer for a three-year period.

The director denied the petition on September 14, 2009, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company; and, the petitioner has not established that it has secured sufficient physical premises to house the new operation.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or 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.

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 nonimmigrant petition was filed on June 3, 2009. The Form I-129 indicates that the beneficiary will be employed in the position of chief executive officer for the petitioner, which claimed to have two employees. In the petitioner's support letter, it stated that the beneficiary will "split his time between our offices in the United States and our affiliate's offices in [REDACTED]". Thus, the beneficiary will be the chief executive officer for both the foreign company and the petitioner. The petitioner explained the duties currently performed by the beneficiary and the duties for the proposed position as follows:

[The beneficiary] is presently the Chief Executive Officer of [the foreign company] and the head of all of our operations in [REDACTED]. In this position, [the beneficiary] has been responsible for overseeing the operation of all [foreign company] offices in [REDACTED], hiring and firing staff, negotiating contracts with educational institutions, establishing the overall goals and policies of all [foreign company] operations, and directing the management of the organization. [The beneficiary] reports only to the shareholders of the company.

Prior to the formation of [the foreign company], [the beneficiary] was the CEO of [REDACTED], which was formed in 2004. [The beneficiary] has therefore been employed full-time by various ACES affiliates for the past five years.

* * *

Due to our expanding business, we require the creation of the Chief Executive Officer position. Up until now, our programs have expanded primarily through development and outreach in [REDACTED]. We do not presently have any executive management in the United States to direct the management of our operations here. A Chief Executive Officer will allow us to develop and expand our relationships with educational institutions in the United States. This position will require full-time employment, but for less than six months out of the year because much of our work requires our executive management to be in [REDACTED]. Please note that [the beneficiary] will not spend more than six months of any year in the United States, so his annual salary will be no more than \$30,000 (\$5,000/month).

The Chief Executive Officer will be responsible for establishing the goals and policies of [the petitioner] and will supervise the management of all U.S. operations. The CEO will supervise all U.S. staff and will have the authority to hire and fire staff. The CEO will have wide latitude to make all necessary and appropriate decisions for the organization.

The CEO must be intimately familiar with our operations in both the U.S. and [redacted] as well as the educational systems and institutions in both countries. Fluency in English and [redacted] is required. The Chief Executive Officer must be familiar with visa processes in the U.S. and [redacted], overseeing human resources, finance, and research and development. Additionally, the Chief Executive Officer must have established relationships with educational institutions in the U.S. and [redacted].

On June 9, 2009, the director determined that the petitioner did not submit sufficient evidence to process the petition, and requested additional evidence. In a response to the director's request for evidence dated August 31, 2009, counsel for the petitioner further explained the beneficiary's executive capacity as follows:

Major accomplishments in last six months are as follows:

- Plan and execute the [redacted] Education Fairs in [redacted] with [redacted] with participation of five [redacted] community colleges, and attendance of officials from the U.S. Embassy in [redacted] and U.S. Consulate in [redacted]. The event was planned in [redacted] and executed in [redacted].
- Set up annual goal of recruiting students for U.S. colleges, and draft plan to fulfill the goal;
- Make financial decisions for marketing in mixed media;
- Reorganize company's executives among [redacted] offices.

Day-to-day description of duties:

- Monday: Weekly meeting with [redacted], Interim Director, to discuss the agenda for the coming week. Telephone conferences with partners to discuss outstanding business.
- Tuesday: Visits to partner schools to discuss and finalize cooperation plans.
- Wednesday: Review performance of current students with [redacted]. Read student reports and comment. Strategize plan for improvement of student performance, if needed.
- Thursday: Mornings are devoted to review of [redacted] financial statements, and meetings and communication with accountant. Afternoons are devoted to teacher recruitment, which involves reviewing applications and interviewing applicants.
- Friday: Finalize the week's achievements, and schedule follow-up for the coming week.
- Conclusion of each workday: Telephone calls to [redacted] offices to troubleshoot any issues, and receive reports from local staff.

Counsel for the petitioner stated that the current employee at the U.S. office is the Interim Director. The petitioner submitted a proposed organizational chart for the U.S. office that indicated a manager and an assistant manager, an administration, finance and marketing and sales office, and six staff members. The chart also stated that the petitioner's offices in the United States are "set up to develop partnerships with colleges, recruit teachers, and arrange visits for business trips that members of our partner institutions may need to take to [redacted] or America. Like [the foreign company's] Headquarters in [redacted], our US officers operate on an efficiency-oriented structure."

The director denied the petition on September 14, 2009 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity. On appeal, counsel for the petitioner stated that the director erred in applying the new office regulations in this matter since the petitioner has been operating in the United States since 2005. In addition, counsel contends that the beneficiary will spend the majority of his time performing managerial and executive duties. Counsel also states that the majority of the beneficiary's time is spent in marketing and soliciting new business rather than doing administrative, ministerial, and/or services tasks. Moreover, counsel states that "additional staff will be hired in the coming months as [the petitioner] expands its operations." Counsel also correctly asserts that the beneficiary may work for the petitioner and may also work for the overseas entity as long as the underlying work is executive or managerial.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive 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.*

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 prove 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as the beneficiary will be responsible for "negotiating contracts;" "hiring and firing of new staff;" "oversee the financial position of the entity;" and "develop and expand the organization into new markets." 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 daily 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will "negotiate contracts," "hiring and firing of new staff;" and "oversee the financial position of the entity" and "develop and expand the organization." On appeal, counsel for the petitioner states that the "day-to-day services of the petitioner include providing orientation services to new students, assisting students with preparation of college application materials, screening students for academic ability, and assisting students with their course of study, developing marketing materials for U.S. educational institutions for distribution by [the petitioner's] affiliates in [REDACTED]." Although the petitioner's affiliates in [REDACTED] may assist with the day-to-day services, the petitioner has not explained that the U.S. company has hired any employees in market research, public relations, financial accounting and bookkeeping and human resources. It appears that the beneficiary will be providing the services of market research and operations, accounting, human resources and public relations. Although the petitioner noted that it currently employs one manager, it is unclear how the one manager will provide all the day-to-day activities for an office that wishes to expand to [REDACTED]." In addition, the petitioner stated that it plans to hire additional employees in the United States to assist with the expansion but it did not provide any information as to a timeline showing when the additional employees will be hired. Again, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties. In addition, the petitioner has not provided a breakdown of the percentage of time the beneficiary will spend on various duties, and the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

On appeal, counsel asserts that the position offered to the beneficiary is in an executive capacity. 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-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.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary will supervise one manager in the U.S. office, it has not established a complex

organizational structure which would elevate the beneficiary beyond a first-line supervisor. In the instant matter, the petitioner has not established evidence that the beneficiary is in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. The AAO has also, however, long required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. It is the petitioner's obligation to establish through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals. Here, the petitioner has not met this burden.

The second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required under the regulations 8 C.F.R. § 214.2(l)(3)(v). As noted by counsel, the director erred in applying the new office regulations for this matter since the petitioner is not a new office. The petitioner explained that it was founded in 2002 and has been doing business since 2005. The petitioner submitted copies of Form 1065, U.S. Return of Partnership Income, for 2005, 2006, 2007 and 2008 showing income for each year. Thus, the petitioner is not a new office.

In addition, the petitioner submitted a sub-lease agreement indicating that it leases an office space. Thus, the petitioner provided evidence that it leases office space. The AAO will withdraw this portion of the decision since the director applied the new office regulations that are not applicable in this matter.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.