

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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**

[REDACTED]

D7

DATE: **AUG 09 2012** 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:
[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition to classify the beneficiary as an intracompany transferee in a managerial or executive capacity 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 Delaware limited liability company, is a telecommunications products and services provider. It claims to be a subsidiary of CITIC 1616 Holdings, Limited, located in Hong Kong. The petitioner seeks to employ the beneficiary in the position of Retail General Manager, North America for a period of three years.

The director denied the petition after concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to provide requested evidence regarding the beneficiary's proposed job duties and the duties of her proposed subordinates.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner has an urgent need for an experienced managerial employee from its Hong Kong operation to assume the proffered U.S. position. Counsel asserts that the beneficiary will be in charge of "a very special and unique Sales Marketing Team in the North American Region and supervise seven (7) sales and marketing professionals." The petitioner submits a more detailed description of the beneficiary's proposed position as well as copies of resumes for the beneficiary's proposed subordinates in support of the appeal.

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 three years preceding the beneficiary's application for admission into the United States. In addition, 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) 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 would be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

II. FACTS AND PROCEDURAL HISTORY

The petitioner filed the nonimmigrant petition (Form I-129) on June 21, 2010. The petitioner indicated on the Form I-129 that the U.S. company has 17 employees and gross annual income of \$2,211,022. The record reflects that the petitioner is engaged in the wholesale distribution and routing of international long-distance capacity on calling from the United States to foreign countries, as well as the marketing and sales of international long-distance calling cards and PINs.

In a letter dated June 9, 2010, the petitioner provided the following description of the beneficiary's proposed U.S. position:

As the Retail General Manager for North America, [the beneficiary] will be responsible for managing the professional staff of the corporate retail department. She will have complete authority to recruit, hire, train, evaluate, and terminate department staff and retail personnel, establish corporate policies and to see that the policies are carried out. [The beneficiary] also has full capacity to negotiate with clients, strategic partners, and prospective customers. In addition, [the beneficiary] will oversee the work of several professionals in the Los Angeles office engaged in the varied retail duties and responsibilities, establish operation procedures, and coordinate with the parent company.

[The beneficiary] will be responsible for the following job duties:

- To analyze retail operations to evaluate performance and determine areas of cost reduction
- To have discretion on sales and retail staffing decisions including hire and termination actions
- To supervise the sales team to attain business targets
- To direct the actual distribution or movement of products or services and maintain close liaison with clients and vendors
- To plan and direct staffing, training and performance evaluations to develop and control sales and service programs
- To oversee regional and local marketing and sales activities
- To prepare budgets and approve budget expenditures
- To review marketing reports, retail sales reports, and financial statements to ensure business progress toward corporate sales goals

The petitioner submitted an organizational chart for "North America" which identifies a total of 17 employees by name. The chart depicts a CEO and seven departments. The chart includes a retail department with two employees: a New York sales manager and a Los Angeles sales assistant manager. It did not identify the beneficiary's proposed position of general manager.

Finally, the petitioner submitted copies of its California Forms DE-6, Quarterly Wage and Withholding Report, and copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2009. The evidence reflects that the U.S. company had between 16 and 18 employees at the end of 2009.

On June 29, 2010, the director issued a request for additional evidence (RFE), in which she instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties in the United States, including information regarding exactly who the beneficiary directs including their job titles and position descriptions; (2) a more detailed organizational chart for the U.S. company which clearly identifies the beneficiary's position in the chart and all employees under the beneficiary's supervision; and (3) for all employees supervised by the beneficiary, a description of their job duties, educational level, annual salaries/wages, immigration status and source of remuneration.

In response to the director's request for a more detailed description of the beneficiary's job duties, the petitioner submitted a list of eight (8) job duties identical to the job description provided at the time of filing. The petitioner also provided a revised organizational chart for North America. The beneficiary is identified as [REDACTED] reporting to the company's CEO. The chart indicates that the beneficiary's direct subordinates would be a [REDACTED] based at "Canada office," a Los Angeles retail employee, a New York retail employee, and outsourced customer service employee(s). The chart shows that the Canadian retail director supervises Toronto and Vancouver retail employees, a Toronto-based retail sales employee, and contracted sales employees in each city. In addition, the chart shows that the Los Angeles retail employee supervises contracts sales teams responsible for Southern and Northern California, and the New York retail employee supervises contract sales teams responsible for New York, Boston and Chicago.

The director denied the petition on August 20, 2010 concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity. In denying the petition, the director observed that the petitioner's initial description of the beneficiary's proposed duties was too vague to establish that the proposed position meets the statutory definition of managerial or executive capacity, and emphasized that the petitioner failed to provide the requested detailed description of the beneficiary's duties in response to the RFE. The director acknowledged that the petitioner provided an organizational chart, but noted that the petitioner failed to provide the requested information regarding the job duties and educational qualifications of the beneficiary's proposed subordinates, thus failing to establish that the beneficiary would be primarily engaged in supervising managers, supervisors or professionals.

On appeal, counsel for the petitioner asserts that the U.S. company "is in urgent need of an experienced senior managerial hand from the foreign parent company to lead the strategic retail marketing department in the North American region." Counsel further states:

The managerial position for [the beneficiary] will make her in charge of a very special and unique Sales Marketing Team in the North American Region and supervises seven (7) sales and marketing specialist professionals of (the petitioner). The position for the transferee, therefore, is a very unique, complex and specialized professional managerial position as required by an L-1 intracompany transferee from foreign parent to its U.S. subsidiary. The transferee position is not a common local sales job. Instead, the transferee position calls for a

senior managerial level professional of an experience manager having a successful and extensive prior working history with both the foreign parent and local subsidiary in the U.S. In addition, since the senior management and the board of directors are located in Hong Kong, the transferee must have excellent bilingual ability to work with the foreign parent company headquarters.

In support of the appeal, the petitioner submits: (1) a slightly revised and expanded position description for the beneficiary which indicates the percentage of time the beneficiary will allocate to six outlined areas of responsibility; and (2) resumes for employees who hold the positions of retail assistant manager (Los Angeles), Canada Retail Sales Director (Vancouver), retail sales manager (New York), retail sales employee (Vancouver), and sales representative (Toronto).

III. ANALYSIS

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(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 each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As noted by the director, the petitioner provided a vague position description that failed to provide any insight into the nature of the beneficiary's day-to-day job duties. The petitioner stated that the beneficiary will be responsible for supervising the sales team, overseeing regional and local sales and marketing activities, exercising discretion regarding sales and retail staffing decisions, preparing budgets, analyzing retail operations, reviewing marketing, sales and financial reports, directing the distribution of products or services, and maintaining "close liaison with clients and vendors." While this description indicates that the beneficiary would have supervisory authority over retail sales activities, it does not define, for example, what specific tasks the beneficiary would perform in relation to client and vendor liaison, retail sales analysis or product distribution. 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 failed to provide any detail or explanation of the beneficiary's proposed activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). The initial position description was too general and nonspecific to demonstrate that the beneficiary will be performing primarily qualifying duties, and it including potentially non-managerial duties that were not adequately explained.

Accordingly, the director reasonably requested that the petitioner provide a more detailed and specific description of the beneficiary's proposed duties. As noted above, the petitioner responded by submitting the exact same list of eight duties that the director had already reviewed and found to be insufficient to establish that the proposed position involves primarily managerial or executive duties.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO acknowledges that the petitioner has provided a revised and slightly expanded proposed position description for the beneficiary on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial capacity of a beneficiary, including the beneficiary's duties, the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner initially indicated that the beneficiary would "oversee the work of several professionals in the Los Angeles office engaged in the varied retail duties and responsibilities"; however, the petitioner submitted an organizational chart for North America which depicted only two employees in the retail department, and only one employee, an assistant retail manager, based in Los Angeles. Therefore, it was unclear who would actually be preparing marketing, sales, and financial reports for the beneficiary to review, or who would relieve the beneficiary from performing other non-managerial duties associated with the retail sales and marketing department. Further, the initial organizational chart did not clearly identify the beneficiary's proposed position. The initial evidence did not establish how the beneficiary would qualify for the benefit sought as a "personnel manager."

Along with requesting a detailed description of the beneficiary's duties, the director requested a detailed organizational chart for the U.S. company as well as names, job titles, job duties, educational qualifications, and other evidence that would clarify the number of employees to be supervised and assist the director in determining whether the beneficiary's subordinate staff would be comprised of managerial, professional or supervisory staff.

While the petitioner submitted an organizational chart in response to the RFE, it included a number of employees not included on the original organizational chart, including employees located in Canada, as well as outsourced and contracted customer service and sales employees. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner failed to provide any objective evidence to corroborate the revised version of the organizational chart. As noted above, the initial organizational chart depicted a North American retail department with one New York-based retail manager and a Los Angeles-based assistant retail manager. The petitioner did not provide evidence related to the existence of a Canadian office or evidence of payments to contractors or outside service providers. 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)).

Further, the petitioner failed to respond to the director's request for the job titles, job duties, educational qualifications and source of remuneration for all of the beneficiary's proposed subordinates. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The record before the director corroborated the employment of one of the beneficiary's claimed subordinate employees, [REDACTED] whose job title is identified on the original organizational chart as [REDACTED] on the subsequent chart.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the beneficiary's claimed subordinates. Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals.¹ Nor has the petitioner shown that these employees supervise subordinate staff members or manage a clearly defined

¹ 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'r 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 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.

department or function of the petitioner, such that they could be classified as managers or supervisors. Again, the petitioner failed to submit position descriptions for any of the employees identified on the organizational charts. 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. An employee will not be considered to be a manager or 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. *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)). The petitioner's failure to provide requested evidence regarding the beneficiary's claimed subordinates precludes the AAO from finding that the proposed employees are employed in supervisory, professional, or managerial positions, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO acknowledges that, on appeal, the petitioner submits resumes for the claimed U.S. and Canadian subordinate employees that include information regarding their respective job titles, job duties and educational credentials. The petitioner was put on notice of this required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

Based on the foregoing, while the AAO does not doubt that the beneficiary will have the authority to hire and fire subordinate personnel, the evidence of record is insufficient to establish that her primary duties would involve the direction and control of a subordinate staff comprised of managerial, professional or supervisory personnel.

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 detailed job description clearly stating 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. The record reflects that the petitioner failed to articulate a claim that the beneficiary would be employed as a function manager in the United States, either at the time of filing or in response to the RFE.

Furthermore, as discussed above, the record does not support a finding that the beneficiary will perform primarily managerial duties due to the petitioner's failure to submit the required detailed position description in response to the request for evidence. Overall, the petitioner's claims are undermined by its failure to provide the requested detailed description of the beneficiary's duties, its inconsistent account of the structure of the organization, and its failure to provide the requested evidence regarding the beneficiary's proposed subordinate employees. Therefore, the petitioner's claims have failed on an evidentiary basis. Based on these

deficiencies, the AAO is unable to determine the actual duties to be performed by the beneficiary and her subordinates, and cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity.

While the petitioner has supplemented the record on appeal by providing some of the evidence requested in the director's RFE, the AAO notes that counsel has raised no specific objection to the stated grounds for denial or identified any specific error on the part of the director based on the evidence that was before her at the time of adjudication. Instead, counsel requests that the director's decision be withdrawn based on the newly submitted evidence, which, as discussed above, should have been provided in response to the RFE. The AAO emphasizes that if the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). 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.