

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

D-7

DATE: JUL 19 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:

SELF-REPRESENTED

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 seeking to employ the beneficiary as a 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, states that it operates a furniture distribution business. It claims to be a subsidiary of [REDACTED] located in Guangdong, China. The petitioner is requesting L-1A status for the beneficiary so that she may serve in the position of Deputy General Manager for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will 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 for review. On appeal, the petitioner asserts that the beneficiary would be working in a managerial capacity. The petitioner submits a brief and additional 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 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 will 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.

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. *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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 23, 2009. The petitioner states that it operates a furniture distribution store with 60 employees and gross sales of \$13,534,392. The petitioner stated the beneficiary will be working as the Deputy General Manager. In a letter dated December 22, 2009, the petitioner stated that the beneficiary will "supervise and be responsible for every aspect of [the petitioner's] managerial related matters."

The petitioner provided a list of eight of the beneficiary's job duties with a percentage breakdown of time spent performing each duty. The petitioner included subcategories under each job duty. The beneficiary's duties as Deputy General Manager included: improving operational execution; maintaining a relationship with the company's major wholesalers and retailers; managing inventory and sales processes; establishing and maintaining all company standards; reviewing and analyzing operational reports; supervising business negotiations; training the inside staff; and reviewing staff performance.

The petitioner provided a list of 10 employees that will be working for the beneficiary, including titles, education level, salary, and a brief job description.

The director issued a request for additional evidence ("RFE") on January 15, 2010 in which she instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the United States company's organizational chart, as well as complete position descriptions for the United States entity's employees; and (2) a more detailed description of the beneficiary's duties in the U.S. including whom the beneficiary directs and the percentage of time the beneficiary will spend on each of the listed duties.

In a response dated February 24, 2010, the petitioner provided a list of the same eight job duties from the initial submission, with a few additional details. The petitioner also provided a list of all employees working for the petitioner including title, immigration status, education level, and job description.

The director denied the petitioner on March 4, 2010. The director found that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity. Specifically, the director determined that a "preponderance of the beneficiary's duties have been and will be directly providing the services of the organization and supervising non-professional employees."

On appeal, the petitioner asserts that the beneficiary's job duties are in fact managerial and that the positions supervised are professional level. Specifically, the petitioner states that the beneficiary supervises four department managers. The beneficiary also claims that the purchasing manager and sales manager are professional occupations. The petitioner cites to the Department of Labor's Occupational Outlook Handbook in support of its conclusions. In addition, the petitioner provides a revised set of job duties for the beneficiary in support of the appeal.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a 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). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within

the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of “manager” or “executive”).

The job duties submitted with the initial petition, and in response to the RFE, do not establish that the beneficiary will be working in a managerial or executive position. The beneficiary’s duties, as stated by the petitioner, include “establishing and maintaining all company standards,” “conducting operational execution,” and “overall responsibility for the training, growth, motivation, and success of the inside staff.” These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner’s initial description of the job duties included a number of duties that, without further explanation, do not appear to fall under the statutory definitions of managerial or executive capacity, and such duties do not appear to be incidental to any qualifying managerial or executive duties the beneficiary performs. For example, the beneficiary’s duties include: capitalizing business opportunities in the market (10%); controlling sales, purchasing, and warehouse inventory (15%); reviewing and analyzing quarterly and yearly operation and managerial reports (15%); and overseeing business negotiations with major customers (15%). These duties include such tasks as: analyzing and monitoring sales records, trends, and economic conditions; examining purchase orders; review sales analysis reports; reviewing and negotiating freight costs; and monitoring the company inventory for turnover. These tasks are necessary to provide the services of the furniture distributor. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn’l.*, 19 I&N Dec. 593, 604 (Comm’r 1988).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary’s duties, the petitioner still has the burden of establishing that the beneficiary is “primarily” performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an “activity” or “function” manager turns in part on whether the petitioner has sustained its burden of proving that her duties are primarily managerial in nature.

The petitioner fails to document what proportion of the beneficiary’s duties would be managerial functions and what proportion would be non-managerial. A review of the subcategories provided show that the beneficiary will be spending 55% of her time working on job tasks, a majority of which are non-managerial. Without a further understanding of the breakdown of duties under each general category, there is no indication of how much time the beneficiary will spend performing qualifying duties. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from the prior description provided. The initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner’s operation. The petitioner must establish eligibility at the time of filing the

nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Due to the inconsistencies and deficiencies catalogued above, the petitioner has not met its burden to establish that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition cannot be approved.

Beyond the decision of the director, the record does not support a finding that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

On the L Classification Supplement to Form I-129 Question 9, the petitioner indicated that the U.S. company is a subsidiary of the foreign employer in China. As evidence of the qualifying relationship, the petitioner submitted the Articles of Incorporation, bylaws, stock certificates, and shareholder ledger. The petitioner claims that [REDACTED] of the petitioner's stock and [REDACTED] of the petitioner's stock.

If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The foreign employer's Articles of Incorporation dated January 26, 2005 show that the shareholder [REDACTED] is invested "in the form of currency in 220,000,000RMB." Although this amount appears to be a majority interest in the foreign employer, the actual number of shares owned and the control of the company is not clearly established. Furthermore, a translation of a Board Resolution on September 19, 2005 shows that [REDACTED] agreed to transfer 70% of his shares to [REDACTED]. There is no indication that this transfer actually took

place and that [REDACTED] paid [REDACTED] for the shares that were to be transferred. There is insufficient evidence in the record to establish that the majority owner of the petitioner is the same as the majority owner of the foreign entity. The petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. For this additional reason, the petition cannot be approved.

The petition will be denied and the appeal dismissed 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.

ORDER: The appeal is dismissed.