



U.S. Citizenship
and Immigration
Services

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DATE: NOV 01 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 on May 17, 2011, 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, a California corporation established on March 4, 2010, engages in import and export of wholesale garments and business apparel. It claims to be a subsidiary of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary as the president and chief executive officer 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 a primarily managerial or executive capacity. In the denial, the director concluded that the beneficiary would be assisting with the day-to-day non-supervisory duties of the business. The director further observed that the petitioner failed to provide any information regarding the job duties and education levels of the beneficiary's 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, the petitioner asserts that if the beneficiary will be employed in a primarily executive position. The petitioner submits a letter and additional evidence 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.

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. The Issue on Appeal

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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 29, 2008. In a letter dated September 5, 2008, the petitioner described the beneficiary's proposed duties as president and CEO as "handling the complete management logistics, distribution and technical support management at our Los Angeles Office." The petitioner provided the following list of duties for the beneficiary:

1. Set guidelines for quality management, technical support management, and attend trade shows.
2. Supervising a team of [sic] that provide technical support to import/export projects and clothing wholesale operations.
3. Supervising a team of top management personnel who run the day-to-day operations at Corp. in the United States.
4. Providing management directives for other management personnel to stay ahead in the clothing wholesale business.
5. Manage finance operations, Personnel and Human Resources development policies.
6. Report back to the parent company in China.
7. Identify potential trading deals.

The petitioner stated on Form I-129 that it currently has a staffing level of four employees. The petitioner provided a current and proposed organizational chart listing the following employees and their positions: 1) [REDACTED] in the sales department; 2) [REDACTED] in the accounting/finance department; 3) [REDACTED] in the warehouse department; and 4) [REDACTED] also in the warehouse department. The petitioner indicated that it expects to hire an employee for the administrative department in 2011, two more employees for the sales department in 2011 and 2012, and two more employees for the warehouse department in 2011 and 2012. According to the organizational chart, the beneficiary will directly supervise all employees. The beneficiary will also report directly to the Board of Directors of the petitioner and the foreign entity. The petitioner submitted its Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2011, confirming that the petitioner employed the above four employees as of March 31, 2011.

The director issued a request for evidence ("RFE") on May 26, 2011, in which she instructed the petitioner to submit, *inter alia*, a more detailed description of the beneficiary's duties in the United States, to include the percentage of time spent to perform the duties. The petitioner responded to the RFE with the following:

1. Supervising a team of [sic] that provide technical support to import/export projects and clothing wholesale operations (5%).

2. *Supervising a team of top management personnel who run the day-to-day operations at Corp. in the United States (15%).*
3. *Providing management directives for other management personnel to stay ahead in the clothing wholesale business (10%).*
4. *Manage finance operations, Personnel and Human Resources development policies (25%).*
5. *Report back to the parent company in China (10%).*
6. *Identify potential trading deals (20%).*
7. *Set guidelines for quality management, technical support management, and attend trade shows (15%).*

The director denied the petition on June 22, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director concluded that the petitioner did not have an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The director noted that the beneficiary's described duties were not detailed enough and restated many of the elements of the definitions of managerial and executive capacity. The director also noted that the petitioner failed to provide evidence establishing the job duties and education levels of the beneficiary's subordinates.

On appeal, the petitioner asserts that the beneficiary is employed in an executive or managerial capacity. The petitioner asserts it hired [REDACTED] as its manager in March 2011 "to oversee the daily operations, so [the beneficiary] can focus on the macro level decision making and executive duties." The petitioner asserts that [REDACTED] is "a qualified professional and possessed sufficient experience to act as the Company's operation supervisor and manager." The petitioner provides amended information about its four employees and their position duties, as follows:

General Manager: [REDACTED]

Job Description: Oversees all aspects of operations within the company, periodically reports to the president. Responsible for maintaining a smooth flow of work between different personals [*sic*], and to assure that the company stays on schedule with regard to sales goals and meets or exceeds the goals set by the president.

Warehouse Manager: [REDACTED]

Job Description: Maintains receiving, warehousing, and distribution operations by initiating, coordinating, and enforcing program, operational, and personnel policies and procedures; safeguards warehouse operations and contents. . .

Warehouse Staff: [REDACTED]

Job Description: Deliver the goods and merchandise to the correct destinations at right time, and handle the goods and materials in an efficient manner.

Driver: [REDACTED]

Job Description: Pick up purchased inventories and deliver merchandises to customers at [sic] a timely manner.

To support the appeal, the petitioner submits: 1) the resumes of [REDACTED] and [REDACTED] 2) the petitioner's Profit & Loss statement from March through August 2011 showing a net loss of \$46,117; and 3) the paychecks for [REDACTED] for the period ending on August 21, 2011.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In the instant matter, the petitioner has described the beneficiary's proposed position in very broad terms, noting his duty to "[provide] management directives for other management personnel to stay ahead in the clothing wholesale business"; "[m]anage finance operations, Personnel and Human Resources development policies; and "[s]et guidelines for quality management, technical support management." As noted by the director, these duties merely paraphrase the statutory definition of managerial and executive capacity. See sections 101(a)(44)(A), (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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

When instructed by the director to provide a more detailed description of the beneficiary's duties in the United States, the petitioner responded by merely attaching percentages of time to the same previously listed duties that the director had already advised was insufficient. The petitioner failed to provide any new details or information regarding the beneficiary's actual daily duties in the United States. The petitioner's response to the RFE fails to fully comply with the director's request.

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 beneficiary's job duties are too broad and unspecific to give a clear understanding of the beneficiary's daily duties. 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 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).

Moreover, some of the beneficiary's listed job duties are not credible or do not appear to be relevant to the petitioner's actual business in the United States. For example, the petitioner repeatedly asserted that the beneficiary will be "supervising a team of top management personnel" but the petitioner's organizational chart failed to identify any subordinate employee in a managerial position in the United States.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, 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 petitioner's evidence must demonstrate that the petitioner has a sufficient organizational structure and/or level of staffing to relieve the beneficiary from performing the daily functions of the U.S. operations and to support the beneficiary in a primarily executive or managerial capacity.

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).

The petitioner provided inconsistent descriptions of its organizational structure and staffing. A comparison of the initial documentation with the petitioner's response on appeal reflects inconsistent descriptions of the position titles and the level of authority of the beneficiary's subordinates. With the initial petition, the petitioner submitted an organizational chart depicting all four employees – a sales employee, an accounting/finance employee, and two warehouse employees - as directly reporting to the beneficiary. However, on appeal, the petitioner significantly changed the position duties of its subordinate employees. In particular, the petitioner deleted the sales position, added a driver position, and added two new levels of management to include a "General Manager" position and a "Warehouse Manager" position. The petitioner now asserts that [REDACTED] previously depicted as in the accounting/finance department, is its "General Manager" and that she "[o]versees all aspects of operations within the company." The petitioner also asserts that [REDACTED] previously one of two employees in the warehouse department, is its "Warehouse Manager" and that she manages the receiving, warehousing, and distribution operations.

The petitioner provided no explanation for the significant changes made to its organizational structure. The AAO will not consider the petitioner's amended organizational structure, offered for the first time on appeal. On appeal, a petitioner cannot make significant changes to its organizational hierarchy or to the job responsibilities of the beneficiary's subordinates. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of*

Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

At the time of filing, the petitioner employed one employee in its sales department, one employee in its accounting/finance department, and two employees in its warehouse department, all of whom reported directly to the beneficiary. The petitioner failed to specify what specific positions each employee held and what their specific job duties were at the time of filing. From the organizational structure as initially depicted, the petitioner failed to establish that the beneficiary will be relieved from primarily performing the non-qualifying, daily tasks of the U.S. operations. As noted by the director, it appears the beneficiary will be no more than a first-line supervisor of non-professional employees.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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(I)(ii)(B)(2).

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. 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 a 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.

The AAO is not persuaded by the petitioner's assertion on appeal that the beneficiary's subordinate employees are professionals. As discussed above, the petitioner's assertion on appeal that [REDACTED] is its "General Manager" and that [REDACTED] is its "Warehouse Manager" is inconsistent with the record of proceeding, and therefore is not considered credible. The petitioner failed to present credible, objective documentary evidence establishing that employees who work in unspecified positions within the accounting/finance department and warehouse department can be considered "professionals" as contemplated by Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32). While the resumes for [REDACTED] and [REDACTED] suggest that both individuals possess educational degrees of a bachelor's or above, the AAO

must focus on the level of education required by the position, not on the actual degree held by the subordinate employee.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president and CEO. However, the petitioner failed to meet its burden of proof in establishing that the beneficiary will primarily be engaged in managerial or executive duties, rather than primarily performing the majority of his time on non-qualifying, day-to-day functions. Overall, the vague job description provided for the beneficiary, considered in light of the petitioner's organizational structure at the time of filing, prohibits a determination that the beneficiary would be primarily employed in a managerial or executive position. Accordingly, the appeal will be dismissed.

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); *Champion World, Inc. v. INS.* 940 F.2d 1533.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.