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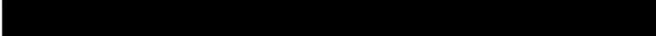
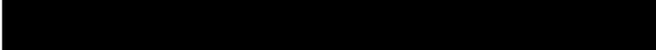
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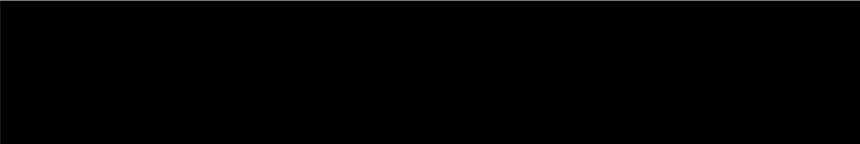


File: WAC 06 037 52033 Office: CALIFORNIA SERVICE CENTER Date: **JUN 05 2007**

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, 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 seeks to temporarily employ the beneficiary as its president to open a new office in the United States 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 corporation organized in the State of California, claims to be engaged in computer parts sales and consultation. It also claims to be the subsidiary of Caltechnology International Ltd., located in Taipei, Taiwan. The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the director erred by concluding that the beneficiary was not employed in a qualifying capacity. In support of this contention, counsel submits a brief and additional evidence.

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 primary issue in this matter is whether the beneficiary will be employed by the United States entity 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.

A letter from the petitioner dated November 10, 2005 explained that the petitioner currently employed four persons, including the beneficiary. The petitioner stated that due to the recent resignation of the petitioner's marketing manager, the beneficiary was temporarily performing the duties of that position as well as those of president. The following overview of the beneficiary's duties was submitted in a document entitled "Beneficiary's Duties in the U.S.":

Job Title: President

JOB DESCRIPTION:

The President is responsible for successful management of the company in the U.S. The major objective is to generate new sales and servicing existing accounts in targeted global / multinational electronic OEM and subcontractor accounts through skilled account management. Key tasks would include developing, implementing, managing a focused sales and marketing program and leading customer focused sales teams.

RESPONSIBILITIES

- Help all employees to understand, develop, affect and impact strategies to drive all [petitioner] cabling solutions (data cable, networking cable and accessories) to assigned target accounts.

- **Persons to direct:** all employees

- Work with company's administration and finance employees to establish common administration process platform and sharing of best practices.

- **Person to direct:** administration/finance specialist ([REDACTED])

- Work with company's sales and marketing specialist to develop an Account Plan and effectively communicate and implement the account strategy through effective sales management system.

- **Person to direct:** Marketing Manager (currently act [sic] by [Beneficiary])

* * *
- **Person to direct:** Sales Manager [REDACTED]

* * *

- Other external activities for effective business operation.

The petitioner also submitted an organizational chart demonstrating that as president, he oversaw the administration/finance manager, the marketing manager (currently himself), and the sales manager. The sales manager in turn oversaw one sales assistant.

On December 29, 2005, the director requested additional evidence with regard to the beneficiary's managerial and/or executive capacity. Specifically, the director requested a more detailed organizational chart which displayed the organizational hierarchy of the petitioner. The director also requested information regarding the educational backgrounds of the beneficiary's subordinates. Finally, definitive evidence of the beneficiary's executive capacity was requested, including a list of the specific goals and policies the beneficiary had established, the specific discretionary decisions he had made, and his day-to-day duties for the past six months. Additionally, evidence demonstrating that he only received general supervision from the petitioner's

board of directors was requested. Finally, payroll records and copies of the petitioner's quarterly wage reports were requested to verify the employment of the persons identified on the organizational chart.

In a response dated February 14, 2006, the petitioner addressed the director's requests. The petitioner resubmitted the organizational chart previously submitted, with a notation that the marketing manager had resigned and was temporarily being replaced by the beneficiary. The petitioner also addressed the director's request for evidence of the beneficiary's executive capacity and stated that an "On-Job Certification" was submitted in support of the beneficiary's executive capacity. It also resubmitted the description of duties quoted above and provided the additional details set forth below:

Goals and Policies the beneficiary Established

The goal of the U.S. company is to strive to be the leading supplier of custom-made cable assemblies and other relative products through its total quality and customer satisfaction approaches. The company policy is to achieve Total Quality Performance in meeting the requirements of its customers. Total Quality Performance means understanding who the customer is, what the requirements are, and meeting those requirements without error, on time, each time.

Discretionary Decisions the beneficiary has Exercised

- a) Setup office management tools and sales service system to increase work effectiveness.
- b) Enabled financial resources at the beneficiary's discretion in the accomplishment of important priorities and goals.
- c) Decided ways that work in creating company sales revenue. The U.S. company has increased sales amount during year 2005 by more than 4 times over year 2004, i.e., \$1.1 million over \$0.25 million, and are now becoming profitable company.
- d) Judged means of conducting multinational logistic control among U.S., Japan and Taiwan that has led to ultimate customer satisfaction.

On March 15, 2006, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary was employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that since the beneficiary was actively performing the duties of the marketing manager at the time of filing, he was clearly engaged in non-qualifying duties. Additionally, the director noted there was no subordinate staff of managerial, supervisory, or professional employees under the beneficiary's supervision. The director concluded that the petitioner did not have the organizational complexity to support the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel argues that the director "misunderstood the point described," and claims that the description of duties provided clearly shows that the beneficiary was making policy decisions. Counsel further alleged that the beneficiary was in fact overseeing a staff of professionals. Finally, counsel contends that the description of duties provided adequately accentuated the executive nature of the beneficiary's duties

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the current structure of the petitioner's enterprise, the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive.

While the beneficiary is the intended president of the company, there is insufficient evidence to show that he is acting primarily 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). In this case, the petitioner clearly states that the beneficiary has assumed the duties of the marketing manager as a result of her resignation. The duties of the marketing manager were said to include "marketing" and "promotion activities." In addition, in the description of the beneficiary's day-to-day duties, the petitioner indicates that the beneficiary oversees the marketing manager (currently himself). As a result of the claim that the beneficiary performs the duties of both the president *and* the marketing manager, it is unclear which position requires the majority of the beneficiary's time. The actual duties themselves 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial and/or executive functions, and what portion would be devoted to marketing tasks and thus be deemed non-managerial. The petitioner lists the beneficiary's duties as including both managerial and marketing and sales-related tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the duties of the marketing manager do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine 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).

Since the beneficiary appears to be directly performing all the marketing tasks for the company, and since many of these duties are non-qualifying in nature, it appears that he is not employed in a primarily managerial or executive capacity. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner claims that the beneficiary oversees three employees (not including himself in the role of marketing manager). Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 the 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. In response to the request for evidence, the petitioner claimed that all of its employees possessed college degrees. The petitioner did not, however, establish that a bachelor's degree is actually necessary to perform the work of the positions subordinate to the beneficiary.

Furthermore, counsel on appeal essentially acknowledges that the beneficiary performs many non-qualifying duties, arguing that the development and current status of the petitioning enterprise requires these services. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In this case, however, the petitioner has been in business since 2003 and can no longer be considered a new office. As a result, a presumption exists that the U.S. entity should be sufficiently operational and established, thus obviating the need for a manager or executive to engage in non-qualifying tasks. Clearly this is not the case in the instant matter, as demonstrated by the beneficiary's hands-on marketing duties and definitive obligation to fill in for absent subordinate employees due to the small size of the petitioner and the lack of other employees to relieve the beneficiary from engaging in such non-qualifying tasks. The AAO is therefore precluded from determining that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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). In this matter, it is undisputed that the beneficiary was performing non-qualifying duties as the time the petition was filed since he was actively assuming the critical position of the marketing manager. As stated above, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. As the petitioner has failed to establish that the beneficiary will be relieved from having to primarily perform non-qualifying duties, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the petitioner and the foreign employer. Although the petitioner claims to be a wholly-owned subsidiary of the foreign entity, the petitioner has failed to submit sufficient evidence to support this claim.

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; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 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, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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, Citizenship and Immigration Services is unable to determine the elements of ownership and control.

In this matter, the record contains the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return. Line 5 of Schedule K, and Statement 5 in support thereof, claims that the petitioner is 100% owned by the foreign entity. However, without corporate documentation such as that discussed above, this document alone is insufficient to show that a qualifying relationship exists between the parties. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.