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Obtaining A Visa For A Manager Or Executive Of A Multinational Corporation: What The Employer Needs To Know

Clarence Smith, Jr.

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The L-1 non-immigrant visa category is one of the most useful tools available to multinational companies seeking to bring foreign workers to the United States. It is relied upon by domestic firms to employ foreign workers as executive managers in this country. See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Immigration and Nationality Act (“the Act”) provides that priority visas should be issued to those aliens who can demonstrate that they are employed by a multinational corporation in an executive or managerial capacity. The Act provides that the alien must first meet the following criteria:

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien’s application for classification and admission into the United States under this subparagraph, has been

Clarence Smith, Jr. is a Partner and head of Connell Foley LLP’s Immigration Law practice. He was formerly Assistant Chief Counsel to the United States Department of Homeland Security. Mr. Smith can be reached at (973) 535-0500.

employed for a least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

See INA § 203 (b)(1)(c), 8 U.S.C. § 1153(b)(1)(c).

While a company may genuinely perceive the job description and duties of its employee to qualify as those of a manager or executive, the United States Citizenship and Immigration Service (“USCIS”) may conclude otherwise if the petitioning company’s application and evidence are deemed insufficient. Many visa petitions for international executives and managers are denied for failure to prove that the employee’s duties are executive or managerial in nature. Courts will almost always defer to the discretion of the immigration official unless the decision of the official is arbitrary or capricious.

The principle of limited review has been enunciated in numerous cases. In *Republic of Transkei v. INS*, 923 F. 2d 175 (D.C.Cir. 1991), the Republic of Transkei, one of the “homelands” created by The Republic of South Africa (not recognized by the United States or most countries as a sovereign nation), established a Washington Bureau, a not-for-profit corporation which disseminated



Clarence Smith, Jr.

trade, tourism and political information encouraging investment in and trade with Transkei. The government of Transkei appointed Chief Moshoeshoe, then Counsel General of The Transkei Consulate in Durban, South Africa, to be President of the Washington Bureau. The employer – Washington Bureau – then filed a petition with INS to change Moshoeshoe’s non-immigrant classification from B-1 (a visitor status) to L-1 (an “intra-company transferee” status). When the INS director denied the petition, the employer appealed to the INS Administrative Appeal’s Unit (“AAU”), which affirmed the director’s decision, ruling that the Bureau had not established that

Please email the author at csmith@connellfoley.com with questions about this article.

the proposed employee's duties in the United States would be primarily executive or managerial in nature. The D.C. Circuit upheld the INS decision, noting the limits of its review: "Our review of the INS application of these definitions to the Bureau's for Moshoeshoe's reclassification is limited. We may vacate the INS decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 177.

The principles of limited judicial review are enunciated in more recent cases. In *Systronics Corporation vs. INS*, 153 F. Supp. 2d 7 (D.D.C. 2001), Systronics Corporation filed a petition for an alien worker with the INS to classify an alien worker named Eddy C. Tsauro as a multinational executive or manager under the Act. Systronics claimed that Tsauro was an executive employee and intra-company transferee "who was to assume the duties of president and general manager of Systronics." The INS initially approved the petition, but later revoked it after receiving a memorandum from The American Institute in Taiwan, which questioned the validity of Systronics' claim that Tsauro would be serving in an executive or managerial capacity. Based on this newly discovered information, the INS revoked the petition finding a lack of evidence showing that Tsauro served in an executive or managerial capacity in either the United States company or the entity in Taiwan. The District Court held that the determination of good and sufficient cause is committed to the discretion of the Attorney General. The Court also stated that it lacked subject matter jurisdiction to decide the merits of the case but held that, even if the matter had been reviewable, there was substantial evidence in the record suggesting that the employer was a mere shell corporation. Factors cited included the terms of the employer's lease, its small size, and the vagueness of Tsauro's exact duties.

In *Firstland International, Inc. vs. United States Immigration and Naturalization Service*, 2006 WL 436011 (E.D.N.Y.), Firstland International, Inc., a manufacturer of cigar accessories, was a wholly-owned subsidiary of the Shanghai Yengzhang Shiguang Lighter Co., Ltd. Firstland successfully applied

for an L-1A non-immigrant visa on behalf of Shao Zeng Chai, a high ranking manager in the parent company. Firstland subsequently filed a petition on behalf of Chai, requesting the INS to designate him as an international executive or manager pursuant to the Act. The INS later sent Firstland a notice of intent to revoke Chai's I-140 petition. The notice asserted that Chai's duties with the United States company were executive or managerial in title only. The INS listed several factors to explain why Chai's petition should not be approved, including questionable gross receipts figures and insufficient staffing to relieve Chai of his non-managerial duties. On Firstland's appeal, the district court found that the INS had "good and sufficient cause" to revoke the visa petition where Firstland's description did not clearly demonstrate that Chai's duties were primarily executive or managerial in nature, citing *Matter of Estime*, 19 I. & N. Dec. 450, 451 (BIA 1987); *Matter of Li*, 20 I. & N. Dec. 700, 701 (BIA 1993); *Matter of Tawfik*, 20 I. & N. Dec. 166, 167 (BIA 1990); *Ramilo v. DOJ*, 13 F.Supp.2d 1055, 1057 (D.Haw.1998), *aff'd* 178 F.3d 1300 (9th Cir.1999); *Ana Int'l v. Way*, 393 F.3d 886, 894 (9th Cir.2004); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 12 (D.D.C.2001).

Because courts will almost always defer to the discretion of the INS when deciding these cases, it is essential that the multinational employer properly designate the applying employee as an executive or manager in the petition and provide detailed and sufficient evidence to support the designation. Job title alone will not qualify the employee as an executive or manager under the Act. First-line supervisors are not considered managers unless the employees they supervised are also professional. See 8 C.F.R. §204.5(j)(2); *Q. Data Consultant, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003) (where former position as Senior Software Manager was only partially managerial and prospective position as Team Manager supervising a maximum of 14 employees was not primarily managerial, the Court held INS did not unreasonably conclude that the position was not executive or managerial in nature). If the employer can show that the same

employee manages an "essential function" of the company, however, the percentage of the employee's managerial duties or the number of employees supervised are irrelevant. See 8 C.F.R. §204.5(j)(2). To that end, it must be demonstrated that the managerial position includes functions that are essential to the organization as a whole, not just one component. See *Ikea U.S., Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, (D.D.C. 1999).

Several administrative decisions explain how an employer can overcome objections by an INS Director who originally ruled that the employee's duties did not include managing an essential function of the organization. 2001 WL 3407803(INS) (petitioner has established that even though the beneficiary did not supervise managerial or professional employees, she nevertheless managed an essential function, i.e., the sales and marketing of its products to the United States companies) and 2003 WL 2007987 (INS) (professional software engineer who managed development and implementation of new technology managed an essential component of petitioner's operation).

An organization can also successfully prove that an employee is a manager or executive by showing that:

1. The employee functions at a senior level within an organization, even though the organization is small in size. See 1998 WL 34022348 (INS).

2. The employee is the primary individual responsible for managing the day-to-day operations of the company and manages the organization through other employees who are on the company's payroll as outside contractors. See 2001 WL 34078074 (INS).

3. The employee provides guidance to those supervisory or professional employees who are directly supervised by other managers or executives. See 2001 WL 34078148 (INS).

When a multinational company seeks to bring a foreign employee to work in the United States as an executive or manager, the application must be supported by documentary evidence demonstrating the company's designation and the employee's job description and duties.